TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 81

NATIONAL EQUIPMENT RENTAL, LTD.,
PETITIONER,

vs.

STEVE SZUKHENT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 27, 1963
CERTIORARI GRANTED APRIL 22, 1963

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APPENDIX

Docket Entries

(a)

1-23-62 Complaint filed.

1-24-62 Summons received, etc.

2-19-62 Notice of special appearance.

3-2-62 Notice of motion to quash summons, etc.

3-7-62 Affidavit of Wilbur G. Silverman.

3-7-62 Memorandum of law.

3-7-62 Affidavit Harry R. Schwartz.

3-8-62 Supplementary affidavit—Silverman.

3-8-62 Supplementary memorandum.

3-9-62 Affidavit of Harry R. Schwartz.

3-9-62 Memorandum of Law—Harry R. Schwartz.

3-19-62 Opinion (Dooling).

3-23-62 Notice of appeal and bond filed.

4-3-62 Record on appeal certified and handed to Mr. Silverman for delivery to Court of Appeals.

4-5-62 Receipt of above record received from Court of Appeals and filed.

Opinion and Order of Dooling, J. Appealed From

(50)

Defendants, residents of Michigan, move to quash the service of summons on them.

Defendants obtained farm equipment from Plaintiff under an instrument, denominated a lease, which Defendants signed and acknowledged in May of 1961 and which Plaintiff signed in July 1961. The last operative clause of the instrument provides:

> "* * *; and the Lessee [Defendants] hereby designates Florence Weinberg, 47-21 Forty-first Street, Long Island City, N. Y., as agent for the purpose of accepting service of any process within the State of New York."

Plaintiff commenced this action on January 23, 1962, alleging a total default under the lease commencing June 20, 1961 and demanded all the payments due under the lease. The complaint alleged in a clear and separate paragraph that Defendants had designated Florence Weinberg as an agent for the purpose of accepting service of process within the State of New York. The marshal delivered two copies of the summons and complaint to Florence Weinberg on January 24, 1962 and on that same day she mailed the summons and complaint to Defendants stating that they had been served upon her as the Defendants' agent for the purpose of accepting process within (51) the State of New York in accordance with Defendants' contract with Plaintiff. On January 24, 1962, Plaintiff itself notified Defendants by certified mail of the service of process on Florence Weinberg, the agent designated by them.

On February 15, 1962, (twenty-two days after the service of process on Florence Weinberg) counsel for defendants mailed to Plaintiff's attorney, a notice that counsel appearing specially for Defendants "solely for the purpose of moving to set aside the service of the summons and

complaint". On February 27, 1962, counsel for Defendants served by mail the present motion to quash service, challenging the validity of such a designation of an "agent" to receive service of process as not adequately calculated to give notice and intimating that Florence Weinberg, a person unknown to Defendants and unrelated to them, was, inferentially, a "representative of the Plaintiff in some capacity." The Defendants' argument notes that Florence Weinberg was appointed (meaning, rather, nominated) by Plaintiff and was, seemingly, Plaintiff's agent whereas an appointed agent to receive process is meant to be an agent representative of and representing the Defendants; it is urged that the "agency" here is too unreal to support service of process and is apparently (52) a dual and, therefore, illicit and, for present purposes, an ineffective agency.

As Plaintiff points out, the clause appointing Florence Weinberg was no buried fineprint clause. And, as Plaintiff points out, abundant, actual notice of the service of process was promptly and punctiliously given in a manner that made the whole position plain to Defendants at a glance. Plaintiff's attorney explains that, as Plaintiff's General Counsel and Assistant Secretary, he supervises the proper effectuation of such service of process, seeing to it in each case that Florence Weinberg forthwith forwards to the Defendant the process served on her, together with the explanatory covering letter, and seeing to it that Plaintiff itself sends a separate notification letter to each Defendant forthwith. Plaintiff's attorney explains that Florence Weinberg has agreed to act as designated agent of the lessees without any compensation on the part of the Plaintiff.

Certainly under Plaintiff's practice the clarity of agreement and abundance of comprehensible notice cannot be gainsaid. The principle relied on, that a Defendant may agree in advance to submit himself personally to the jur-

isdiction of a court that, in the absence of agreement, could (53) not extend its process upon him, is settled (*Gilbert* v. *Burnstine*, 1931, 174 N. E. 706, 255 N. Y. 348) and, if not literally invoked by Rule 4 (d) 1, is recognized and applied in the federal courts. (*U. S.* v. *Balanovsky*, 2d Cir. 1956, 236 F. 2d 298, 303; *Kenny Construction Co.* v. *Allen*, D. C. Cir. 1957, 248 F. 2d 656; *Owens* v. *Harkins*, M.D., Ala. N. D. 1955, 18 F. R. D. 62.)

The only possible question is whether such an agency arrangement as this for subjection to a personal jurisdiction that could not otherwise be effectively exerted requires intrinsic provision for reasonable notification, such, for example, as that exacted, in a different context by *Wuchter* v. *Pizzutti*, 1928, 276 U. S. 13. If so, actuality of notice is beside the point for it is not assured in advance.

Here, Florence Weinberg, was not, for all that appears, a party to the transaction by which she was appointed; her acceptance of her appointment is nowhere evidenced save by her performance, many months after the lease was executed, of a duty that would have flowed from her acceptance of her appointment when it was made. It is, simply, exact to say that Florence Weinberg was not appointed the Defendants' (54) agent by their signing the lease and giving it to Plaintiff. To appoint her their agent, Defendants had to deal with her, not Plaintiff, and they did not deal with her. Hence, nothing in the lease, essaying ineffectively to create an agency by appointment, provided for notice to Defendants through the putative agent.

In theory, that was as plain to Defendants as to Plaintiff and it is easy to say that, therefore, Defendants were the ones to make their appointment of Florence Weinberg secure and real and assure themselves of notice. Yet that would have been alien to the arrangement; it rested rather on Florence Weinberg's agreement with Plaintiff, aliunde the lease and unknown to the lessees, that she would act as agent on behalf of the lessees without compensation, and,

strictly, without any obligation not to lay down the agency whenever she chose.

Hence, the nominal appointment of Florence Weinberg as Defendants' agent did not assure an agent's notice to Defendants, if that was requisite. Subject to uncertain policy limitations, Plaintiff would have been free to demand a plain agreement that Defendants subject themselves to suit here without any notice except what Plaintiff undertook (55) to give them. Seemingly harsher, that would in fact have given a legal assurance of notice that the beguiling appearance of an agency that, doubtless through inadvertence, was legally unreal did not give, however, in practice it has given Defendants genuine notice. See, *e.g. National Equipment Rental, Ltd.* v. *Karlin*, Supreme Court, Nassau County, 1957, 166 N. Y. S. 2d 27, 6 Misc. 2d 128 (service on residents who had evaded process). But that was not the course chosen; the chosen course failed of its intended effect, which was not to require Defendants to submit to jurisdiction on notice from Plaintiff, but to supply Defendants with notice, through a fiduciary nominated by Plaintiff but appointed by Defendants. Whether, then, a provision fairly assuring notice is or is not required in principle in contracts to submit to jurisdiction, the present agency form of arrangement was based on assuring notice through an agency intended to be adequately real to produce that effect and the posited basis of the service arrangement fails with the failure of the agency arrangement to achieve intrinsic and continuing reality.

The service of process, accordingly, was insufficient and the result is a lack of jurisdiction over the persons of the Defendants. But see *Green Mountain College* v. (56) *Levine*, Vt. 1958, 139 A. 2d 822. The attempted service of the summons and complaint on each Defendant is, therefore quashed.

It is so ordered.

JOHN R. DOOLING, JR.
U.S.D.J.

Affidavit of Wilbur G. Silverman, Read in Opposition to Motion

(15) UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF QUEENS } ss.:

WILBUR G. SILVERMAN, being duly sworn, deposes and says he is the attorney for the above named plaintiff and makes this affidavit in opposition to the defendants' motion to quash the service of the summons and complaint on the defendants herein.

This action is based upon an equipment lease executed by the parties herein, and results from the default on the part of the defendants in making any payments after the equipment was specifically purchased by the plaintiff for the defendants' use.

The defendants signed the said lease and schedule and had their signatures acknowledged before a Notary Public in their own state of Michigan. The last paragraph before the signature lines of the said lease provided that the agreement shall be deemed to have been made in Nassau County, New York, the rights and liabilities of the parties determined in accordance with the laws of the State of New York and the lessee designated an agent for the purpose of accepting process within the State of New York.

(16) On January 24, 1962, the agent so designated in the agreement was served by the United States Marshal with the summons and complaint in this action. On the same date, by certified mail, return receipt requested, the plain-

tiff notified the defendants of said service and likewise copies so served were mailed to the defendants by the agent on whom service was made.

After the time to answer had expired, a purported special appearance was served by Harry R. Schwartz, Esq., and received on February 16, 1962 by deponent. Deponent telephoned said attorney and informed him that such special notice of appearance did not conform to the rules of this Court and that the same was not timely made. The instant motion likewise mailed February 27, 1962, long after the time to answer had expired, is not supported by any affidavit of either defendant. It is based upon the sole affidavit of the defendants' attorney, who obviously has no personal knowledge of the facts.

The motion is founded on the argument that the service of process on the agent of the defendants named in the contract should not be considered service upon the principals for the reasons:

(a) That the agent named is unknown to the defendants;

(b) That the designation of agent in the contract was "hidden amongst eighteen divisions of fine print";

(c) That the appointee should be related to the individual making the designation;

(d) That proper assurances should be provided to the end that the defendants receive sufficient notification of any process; and

(e) That individuals are not aware that the meaning of the word process includes the word summons.

(17) It is respectfully submitted that there is no requirement in law that an agent is required to be related or known to the principal. For example, the Secretary of State is unknown and unrelated to motorists outside the State of New York and to domestic and foreign corporations, which

by law, designates such Secretary of State as agent upon whom process may be served.

The contract was executed by the defendants and acknowledged before a Notary Public. The paragraph in which the agent was designated was the last paragraph before the signature lines. It was certainly no more hidden than any other paragraph in the contract and probably less so than paragraphs in between. Nevertheless, the fact that provisions of contracts are in printed forms make them no less effective by reason of their being a part of many paragraphs than if there were but few paragraphs. The fact is that the defendants having received the benefits of the contract are satisfied with the fruits thereof, but attempt to reject those paragraphs which they find distasteful. This they may not do.

The assurances to which the moving papers assert the defendants are entitled were in fact received, as evidenced by the letter sent by the plaintiff to the defendant, copy of which is attached to the moving papers.

Finally, the argument that individuals are unaware of the word process, is wholly without merit since the legal meaning of the word process, is wholly without merit since the legal import of an agreement is not challengeable. In fact, the moving papers themselves refer to the summons, as process. Moreover, there is no statement by either of the defendants in the moving papers to the effect that they were not aware of the word and counsel, in his affidavit, attempts to create an impression (18) by implication that individuals are not aware of the meaning of the word.

The defendants have acquired equipment valued at over $20,000, pursuant to the very agreement, portions of which their attorney now challenges. Is is a well settled principle of law that a person cannot avoid a written contract into which he has entered on the ground that he did not attend to its terms, that he did not read the document which he signed or that he supposed it was different in its terms. It is likewise well settled that a mistake of law will not affect

enforceability of an agreement. The defendants cannot complain, therefore, that they did not know what was in the contract, that they didn't read the contract nor that they failed to understand the meaning of the word process. This is especially so, since the defendants have reaped the fruits of the very agreement which they challenge through counsel. Significantly, neither of the defendants have submitted an affidavit to support the contention upon which the attack has been made.

The equipment was delivered to the defendants, a receipt therefor was signed by the defendant, Steve Szukhent, on June 17, 1961, copy of which is annexed hereto, indicating that the equipment was received in good condition and as ordered. Implicitly, the defendants have been using the equipment without having paid for it and its use has been pursuant to the terms of the agreement. They, therefore, are estopped from challenging any provision in the agreement executed by them from which they have received benefits.

Service of process upon the defendants' agent is a well recognized method by which persons submit to jurisdiction of a Court having jurisdiction over the (19) subject matter of litigation. The very rules of this Court recognize that process may be made upon an agent. Rule 4 (d)(1) provides for service upon an individual "by delivering a copy of the summons and complaint to an agent authorized by appointment * * * to receive service of process." The language of the contract now challenged by the defendant is in *haec verba*, the language of the rule; and ignorance of the meaning of the word process should be of no avail to the defendants.

The motion herein having been made after the defendants' default in appearance and in answering, it is respectfully requested that the Court direct the Clerk to enter judgment in favor of the plaintiff on default.

Affidavit of Wilbur G. Silverman

WHEREFORE, deponent prays that an order be made and entered herein denying defendants' motion to quash and vacate the service of the summons and complaint herein, that the Court direct the Clerk to enter judgment in favor of the plaintiff on default as prayed for in the complaint and that plaintiff have such other and further relief as to the Court may seem just and proper in the premises.

(Sworn to by Wilbur G. Silverman on March 5, 1962).

Supplemental Affidavit of Wilbur G. Silverman, Read in Opposition to Motion

(37) UNITED STATES DISTRCT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF QUEENS } ss.:

WILBUR G. SILVERMAN, being duly sworn, deposes and says that he makes this affidavit supplementing his affidavit in opposition to the defendants' motion to quash the service of the summons herein.

In addition to being General Counsel for the plaintiff corporation, deponent is Assistant Secretary of said corporation and is intimately cognizant of the manner in which plaintiff handles notification to defendants or service with process, by serving the agent named in plaintiff's lease with lessees. Deponent supervises the carrying out of the procedures as hereinafter outlined.

In every instance, notice is given by certified mail by plaintiff corporation addressed to the lessee, giving notice that the summons and complaint was served by serving the agent in accordance with the provisions of the contract. The agent upon whom service is so made forwards the process so served upon said agent to the defendant forthwith, together with a covering letter indicating that the enclosure was served on said agent in said capacity and on what date. Deponent oversees and makes certain that both the letter from the plaintiff as well (38) as the process with its covering letter are mailed as above indicated.

Supplemental Affidavit of Wilbur G. Silverman

In the instant case, the letter from the plaintiff by certified mail was sent as indicated in the moving papers and as counsel for defendant stated upon oral argument on the motion herein, process was in fact received from the agent pursuant to a covering letter which read as follows:

"Florence Weinberg
47-21 41st Street
Long Island City, N. Y.

Re: Lease No. OE-1775—A

January 24, 1962

Steve Szukhent & Robert Szukhent
7044 Elms Road
Flushing, Michigan

Gentlemen:

Please take notice that the enclosed Summons and Complaint was duly served upon me this day by the United States Marshal, as your agent for the purpose of accepting service of process within the State of New York, in accordance with your contract with National Equipment Rental, Ltd.

Very truly yours,

Florence Weinberg—FW :ff enc."

Deponent respectfully submits that the philosophical question as to what should be the disposition of the instant motion had the defendants received no notice, is academic and moot, since in the case at bar, the defendants received notice both from the plaintiff and from the agent.

The said agent has agreed to act as such on behalf of lessees without any compensation on the part of the plaintiff.

Supplemental Affidavit of Wilbur G. Silverman

It is respectfully submitted that this motion (39) should be decided upon the facts in this case and not under some academic facts which are not before the Court.

Submitted in a separate memorandum are Federal Court decisions referred to by deponent during argument this day.

WHEREFORE, deponent prays that the defendants' motion to quash service be denied in all respects and that the Clerk be directed to enter judgment in favor of the plaintiff in accordance with law.

(Sworn by Wilbur G. Silverman on March 7, 1962.)

Complaint

(1) UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiff complaining of the defendants by its attorney, Wilbur G. Silverman, Esq., alleges upon information and belief:

FIRST CAUSE OF ACTION

First: That at all times hereinafter mentioned, the plaintiff is a Delaware corporation, having its principal place of business at One Plainfield Avenue, Elmont, N. Y., within the geographical confines of this district.

Second: That the defendants, Steve Szukhent and Robert Szukhent are citizens of the State of Michigan, having its principal place of business at Flushing, Michigan.

Third: That this Court has jurisdiction by reason of diversity of citizenship.

Fourth: That the defendants have designated Florence Weinberg, who resides at 47-21 41st Street, Long Island City, as an agent for the purpose of accepting service of process within the State of New York.

Fifth: That heretofore; plaintiff leased to the defendant, certain equipment pursuant to a written lease designated OE 1775 and Schedule A thereto, copies of (2) which are hereto annexed and made a part hereof as if fully set forth at length herein.

Sixth: That said defendants defaulted in making the first payment due June 20th, 1961 and the months subsequent thereto.

Seventh: Although said defendants were duly notified in writing of their default as aforesaid, they failed to cure said default within the time limited by said lease and are still in default thereunder.

Eighth: By reason of said default, plaintiff has declared all of the said rentals under said lease and schedule due and payable, to wit, the sum of $20,620.00, with interest from June 20, 1961.

Ninth: That no part of the aforementioned sum of $20,620.00 has been paid, although due demand therefor has been made, in accordance with the terms of said lease.

Tenth: That by reason of the foregoing, there is now due to the plaintiff from the defendant, the sum of $20,620.00 with interest thereon from June 20, 1961.

SECOND CAUSE OF ACTION

Eleventh: Plaintiff repeats and reiterates each and every allegation contained in paragraphs marked "First" through "Tenth" inclusive of the complaint, as if fully set forth at length herein.

Twelfth: Pursuant to the terms of the aforementioned lease, in the event of default on the part of the lessee, the lessee became liable for all expenses incurred by lessor in connection with the enforcement of its (3) remedies, including legal expenses and attorneys fees equal to 15% of the total unpaid balance.

Thirteenth: That by reason of the aforesaid, defendant is liable for attorneys fees equal to $3,093.00.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of $23,713, with interest on $20,620.00 thereon, from June 20, 1961, together with the costs and disbursements of this action.

WILBUR G. SILVERMAN
Attorney for Plaintiff
Office & P.O. Address
88-11 169th Street
Jamaica 32, N. Y.

[fol. 24]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 21—October Term, 1962
Argued October 11, 1962
Docket No. 27486

NATIONAL EQUIPMENT RENTAL, LTD., Plaintiff-Appellant,

v.

STEVE SZUKHENT and ROBERT SZUKHENT,
Defendants-Appellees.

Before: Clark, Moore and Smith, Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York, John F. Dooling, Jr., D. J., quashing service of summons and complaint on non-resident defendants in action on a farm equipment lease.

Affirmed.

Wilbur G. Silverman, Jamaica, New York, for plaintiff-appellant.

Harry R. Schwartz, Brooklyn, New York, for defendants-appellees.

[fol. 25]

OPINION—December 6, 1962

SMITH, Circuit Judge:

Defendants, residents of Michigan, obtained farm equipment in Michigan on a lease from plaintiff, a Delaware Corporation with its principal place of business in New

York. Claiming default, plaintiff sued for payments under the lease in the Eastern District of New York, the marshal delivering two copies of the summons and complaint to one Florence Weinberg as agent designated in the lease for the purpose of accepting process for defendants in the State of New York. The copies were promptly forwarded by Weinberg to defendants by mail with a covering letter under an agreement between Weinberg and plaintiff to perform this service without compensation. Nothing in the lease required notice to defendants. Plaintiff also notified defendants by mail promptly on the purported service of the process. The United States District Court for the Eastern District of New York, John F. Dooling, Jr., D. J., held the service invalid and quashed the service. Plaintiff appeals. We agree with the District Court that no valid agency of Weinberg for defendants was created by the instrument in suit and affirm the order.

The lease contract here was on a printed form provided by plaintiff. There is no requirement in the purported appointment of the agent for any notice to defendants. A provision for notice would be essential to the validity of a state statute providing for substituted service on a statutory "agent". *Wuchter* v. *Pizzutti*, 276 U. S. 13 (1928). There is no such requirement when individuals freely contract for a method of substituted service. Lack of such a provision in a contract of adhesion, here involved, may, however, be considered in determining the meaning and effect of the provisions of the contract. There is no provision in the lease for any undertaking by the purported agent to act for, or give notice to her purported principal. [fol. 26] Normally, an agency exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act, Restatement Agency § 15, and the agent is subject to control by the principal, Restatement Agency § 1. Plaintiff's affidavits demonstrate that Weinberg was acting under an agreement with and supervision of the plaintiff, having undertaken no obligations to defendants, to whom she was unknown. Defendants never dealt with her and had no indication of any undertaking on her part to act as their agent until receipt of the process many months later.

The court properly held such a purported appointment unreal and ineffective to create a genuine agency of Weinberg for defendants.

Plaintiff might have provided, with defendants' agreement, that service or notice be waived or that notice be given by plaintiff. See *Bowles* v. *J. J. Schmitt & Co.*, 170 F. 2d 617, 622 (2 Cir. 1948), *Gilbert* v. *Burnstine*, 255 N. Y. 348, 174 N. E. 706 (1931). This would, however, have required defendants' consent, which might or might not have been forthcoming. The illusory purported agency provision, however, is properly held ineffective to subject defendants to suit in New York.

Affirmed.

MOORE, Circuit Judge (dissenting)

The question here presented goes so much beyond the facts of this particular case that I believe my contrary view should be stated. After all, it may be said, who (except this plaintiff, of course) cares whether a Michigan farmer pays for machinery he has leased in New York? However, the federal jurisdiction problem presented here is of the greatest commercial importance to merchants and consumers who engage in interstate business transactions. [fol. 27] Furthermore, the opinion of the majority would appear to be in conflict with *Kenny Construction Co.* v. *Allen*, 248 F. 2d 656 (D. C. Cir. 1957) and *Green Mountain College* v. *Levine*, 120 Vt. 332, 139 A. 2d 882 (1958).

Plaintiff, a Delaware corporation with its principal place of business in New York, is in the business of purchasing equipment on its customers' orders for leasing to the customers on terms and conditions set forth in an instrument denominated a lease. Defendants, residents of Michigan, obtained farm equipment from plaintiff pursuant to such a lease, the last operative clause of which read:

> " * * * and the Lessee hereby designates Florence Weinberg, 47-21 Forty-First Street, Long Island City, New York, as agent for the purpose of accepting service of any process within the State of New York."

Plaintiff, alleging default under the lease, commenced this action in the Eastern District of New York. The Marshal delivered two copies of the summons and complaint to defendants' designated agent, Florence Weinberg, who promptly mailed them to defendants with a covering letter, explaining that they had been served upon her as the defendants' agent in accordance with the provisions of the lease. On the same day, plaintiff itself notified defendants by certified mail of the service of process on Florence Weinberg. Twenty-two days after this service, counsel for defendants notified plaintiff's attorney that he was appearing specially to set aside the service of the summons and complaint. The District Court held the service invalid and quashed it.

The clause appointing the agent was no fine print clause buried in an oppressively long and complex instrument. [fol. 28] The entire contract is only 1¼ pages long and the agency provision is in the last paragraph appearing directly above defendants' signatures. The clause was included in the contract for the purpose of subjecting defendants to suit in the courts[1] in New York and for no other purpose. Without such a clause plaintiff might well have refused to make the contract. To carry a New York obtained judgment to the other forty-nine States for enforcement is quite a different matter than trying lawsuits and engaging counsel for this purpose in these other States.

The trial court found that it was plaintiff's established practice to assure that prompt notice was sent to defendants of any action it brought against them. That citizens of different states may agree in advance that any disputes arising out of a commercial transaction between them shall be subject to the jurisdiction of the courts of a designated state is well established. *United States* v. *Balanovski*, 236 F. 2d 298 (2d Cir. 1956); *Kenny Construction Co.* v. *Allen*, 248 F. 2d 656 (D. C. Cir. 1957); *Erlanger Mills, Inc.* v. *Cohoes Fibre Mills, Inc.*, 239 F. 2d 502 (4th Cir. 1956); *Bowles* v. *J. J. Schmitt & Co., Inc.*, 170 F. 2d 617 (2d Cir. 1948);

[1] Such an agency designation would not subject the defendants to the jurisdiction of the courts of the State of New York. *Rosenthal* v. *United Transp. Co.*, 196 App. Div. 540, 188 N. Y. S. 154 (App. Div. 1921).

Gilbert v. *Burnstine*, 255 N. Y. 348, 174 N. E. 706 (1931); Restatement, Conflicts § 81; Restatement, Judgments § 18; *cf Adams* v. *Saenger*, 303 U. S. 59 (1938).

The only question presented by this appeal[2] therefore is [fol. 29] whether the service made on Florence Weinberg is service on "an agent authorized by appointment * * * to receive service of process" within the meaning of Rule 4(d)(1) of the Federal Rules of Civil Procedure.[3] The majority's strained search for the contract's "meaning" and "effect", and their invocation of *Wuchter* v. *Pizzutti*, 276 U. S. 13 (1928) to provide the unexpressed intendment of the parties do not obliterate the federal nature[4] of the question being here decided. Although my colleagues do not expressly evince a desire to remove Rule 4(d)(1) from the books entirely, they not only substantially rewrite the Rule but also write for the parties a contract into which they probably never would have entered.

The majority initially concede that the constitutionally dictated requirements of *Wuchter* v. *Pizzutti, supra*, do not apply to contracts entered into by individuals. Then, in the guise of construing the contract in question, they read those same requirements into Rule 4(d)(1). That this is the effect of their decision is made clear by their concern that "there is no provision in the lease for any undertaking

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[2] Since there was jurisdiction of the present suit solely on the ground of diversity of citizenship and since the suit was brought in the district of the plaintiff's residence, there was, by virtue of § 1391 of the Judicial Code, no want of venue and the district court was not warranted in dismissing the suit if the service of summons was effective to make the defendant a party. For a similar situation see *Mississippi Publishing Corp.* v. *Murphree*, 326 U. S. 438 (1945).

[3] The agency appointment in question was framed to a large extent in the language of that Rule. The Rule, in pertinent part, reads as follows:

> (4)(d) * * * Service shall be made as follows:
>
> (1) Upon an individual * * * by delivering a copy of the summons and of the complaint *to an agent authorized by appointment* or by law *to receive service of process*. (Emphasis added.)

[4] See *Bowles* v. *J. J. Schmitt & Co., Inc.*, 170 F. 2d 617 (2d Cir. 1948).

by the purported agent to * * * give notice to her purported principal." In *Wuchter*, the Supreme Court held invalid the non-resident motorist statute in question because "the statute of New Jersey * * * does not make provision for communication to the proposed defendant." Rule 4(d)(1) is now construed to mean that any agency arrangement that does not impose upon the designated agent a contractually [fol. 30] unassailable duty to send notice is not sufficient to subject the appointing party to the personal jurisdiction of the courts of the designated state. The fact that notice was actually given is held to be of no consequence.

The Supreme Court, in *Wuchter*, declared that in those situations in which a State may subject a non-resident individual to the jurisdiction of its courts other than through personal service within the State, due process requires that the statutory scheme provide a means of service reasonably calculated to apprise the defendant of the proceedings against him. Compare *Wuchter, supra*, with *Hess* v. *Pawlowski*, 274 U. S. 352 (1927). See *McGee* v. *International Life Insurance Co.*, 355 U. S. 220 (1957); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950). In that case the Court was dealing with the limitations on the coercive powers of the States imposed by the due process clause of the Fourteenth Amendment, and not with arrangements for service of process voluntarily agreed to by individuals. As Cardozo, J., said in related context, "The distinction is between a true consent and an imputed or implied consent, between a fact and a fiction." *Bagdon* v. *Philadelphia & Reading Coal & Iron Co.*, 217 N. Y. 432, 437 (1916). See L. Hand, D. J., in *Smolik* v. *Philadelphia & Reading Coal & Iron Co.*, 222 Fed. 148 (S. D. N. Y. 1915). The demise of the implied consent theory serves only to accentuate that distinction, namely, between a voluntary and a forced subjection to the jurisdiction of the courts of a state.

Actual notice by an agent authorized by appointment to receive service of process should be dispositive. The reasoning of Justices Brandeis' and Holmes' dissent in *Wuchter* is, in the context of Rule 4(d)(1), compelling:

> "Notice was in fact given. And it was admitted at the bar that the defendant had, at all times, actual

knowledge and the opportunity to defend. The cases [fol. 31] cited by the Court as holding that he could deliberately disregard that notice and opportunity and yet insist upon a defect in the statute as drawn, although he was in no way prejudiced thereby, seem hardly reconcilable with a long line of authorities." 276 U. S. at page 28.

To allow a defendant to insist upon what the majority here holds to be a defect in this privately drafted and voluntarily agreed to agency appointment, even though he has in no way been prejudiced thereby, is the essence of formalism. The purpose of service of process is to apprise the defendant that suit has been brought against him and to give him an opportunity to defend. *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945); *Wuchter* v. *Pizzutti*, *supra*; *Grooms* v. *Greyhound Corp.*, 287 F. 2d 95 (6th Cir. 1961); *Tarbox* v. *Walters*, 192 F. Supp. 816 (E. D. Pa. 1961); *American Football League* v. *National Football League*, 27 F. R. D. 264 (D. Md. 1961). Once it is found that that purpose has been served, the inquiry should come to an end.

I do not reach the question whether actual receipt of notice by the defendant is always required because here notice was received. If the agent is the nominee of the defendant, plausible argument has been made that service of process is valid even though notice is not forwarded to the defendant. *Kenny Construction Co.* v. *Allen*, 248 F. 2d 656 (D. C. Cir. 1957); *Green Mountain College* v. *Levine*, 120 Vt. 332, 139 A. 2d 822 (1958).

In considering this question, the Vermont court said:

> "The capacity of the Secretary of State to accept the appointment and the danger that he might not forward notice to the defendants were risks which they took in appointing him. Restatement Agency § 21." 120 Vt. at page 336.

[fol. 32] Also apropos here are the words of the Supreme Court in the landmark case of *Pennoyer* v. *Neff*, 95 U. S. 714, 735 (1877):

"It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them."

The rationale of the majority opinion would, however, extend even to the case posited. They require that the authorization to receive service of process intrinsically provide that the agent be bound to forward notice to the defendant. If, for example, defendants in the present action had selected Florence Weinberg themselves but no consideration ran to her or some other contractual infirmity existed, they would hold that service on her was invalid because she was under no obligation, no binding undertaking, to forward notice. And yet they actually go so far as to concede that a contract providing for no notice at all would have been permissible. Also implicit in the majority opinion is the thought that an appointed agent must be presumed to be faithless to his obligation and that some compensation must be paid by the principal for the services. If these are to be the legal consequences, then precautionary steps should be taken to require that the contract provide for a certificate from the agent in substance as follows: "I, Florence Weinberg, hereby agree for good and valuable consideration by me received from the Lessee, faithfully to perform my agency duties and to forward forthwith by registered mail any papers served on me."

At the heart of the majority opinion there seems to lie a mistrust of the agency provision in question because it might be construed to permit the entry of a default judg- [fol. 33] ment with no notice being provided the defendants.[5] Hard cases may make bad law but easy cases,

[5] If it should be deemed necessary in this case to engage in contract interpretation, I believe that the far more reasonable and realistic view of this agency provision, in view of the plaintiff's firmly established practice, would be one requiring that notice be given the defendants, if not by the agent, then by the principal. See the dissents of Justices Brandeis, Holmes and Stone in *Wuchter v. Pizzutti*, 276 U. S. 13, at pages 25 and 28. If proof of such notice

misconceived to be hard ones, make even worse law because in the latter there is not even the seeming justification attendant the former.

Defendants here received all they were entitled to. They agreed to submit to the jurisdiction of the courts in New York and that is all plaintiff required them to do. No default judgment is contemplated; they received adequate notice of the suit pending against them and were afforded ample opportunity to defend. In order to relieve them of this obligation which they voluntarily incurred, the majority throws in doubt the validity of countless provisions of a similar nature and throws the law into a state of confusion and uncertainty. If, as the majority seem to fear, this agency provision can be used as a vehicle of oppression and overreaching, I suggest that we wait until such a case is presented to us. The same Federal Rules that provide for service of process upon an agent authorized to receive such service also contain provision for the setting aside of default judgments, Rule 55(c), and for relieving a party from a final judgment, Rule 60(b). I cannot bring myself to believe that the federal courts would not, in such a case, use the above rules to good advantage.

I would require the parties to abide by their contract and would reverse the district court.

---

were not forthcoming, the service of process would be properly quashed.

The nub of my disagreement with the majority, of course, is that they read into Rule 4(d)(1) the requirement that the agent be under an unassailable obligation to send notice, regardless of whether notice is actually sent by the agent, by the plaintiff, or as here, by both.

[fol. 34]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Charles E. Clark, Hon. Leonard P. Moore, Hon. J. Joseph Smith, Circuit Judges.

NATIONAL EQUIPMENT RENTAL, LTD., Plaintiff-Appellant,

v.

STEVE SZUKHENT and ROBERT SZUKHENT, Defendants-Appellees.

JUDGMENT—December 6, 1962

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed; with costs to the appellees.

A. Daniel Fusaro, Clerk.

[fol. 35] [File endorsement omitted]

[fol. 36] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 37]

SUPREME COURT OF THE UNITED STATES

No. 873—October Term, 1962

NATIONAL EQUIPMENT RENTAL, LTD., Petitioner,

vs.

STEVE SZUKHENT, ET AL.

ORDER ALLOWING CERTIORARI—April 22, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 81

NATIONAL EQUIPMENT RENTAL, LTD.,

Petitioner,

—against—

STEVE SZUKHENT and ROBERT SZUKHENT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

WILBUR G. SILVERMAN
Attorney for Petitioner
88-11 169th Street
Jamaica 32, N. Y.

12 CASE PRESS INC., 421 Hudson St., N. Y.—ORegon 5-4540

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IN THE

Supreme Court of the United States

October Term, 1962

No.

NATIONAL EQUIPMENT RENTAL, LTD.,

Petitioner,

—against—

STEVE SZUKHENT and ROBERT SZUKHENT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

The petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, dated the 6th day of December 1962, affirming by a divided court, an order of the United States District Court for the Eastern District of New York, entered on March 19, 1962.

Opinions Below

United States District Court for the Eastern District of New York, Dooling, *J.*, rendered an opinion and order entered in the office of the Clerk of the United States District Court for the Eastern District of New York on March 19, 1962, reported in 30 FRD 3.

United States Court of Appeals for the Second Circuit rendered an opinion dated December 6, 1962, reported in 311 F. 2d 79.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was dated December 6, 1962, and the mandate entered in the office of the Clerk of United States District Court for the Eastern District of New York on the 27th day of December 1962. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Question Presented

Was valid service of process effected upon the respondents by the service of the summons and complaint upon the person nominated and designated as their process agent in a written contract when actual notice of such service was given by both process agent and petitioner, even though the contract contained no provision requiring such notice.

Constitutional and Statutory Provisions Involved

1. United States Constitution, Amendment V:

> "* * * nor shall any person * * *, be deprived of life, liberty or property, without due process of law; * * *"

2. Federal Rules of Civil Procedure, Rule 4 (d) (1):

> "(d) Summons: Personal Service * * *. Service shall be made as follows:
>
> (1) Upon an individual * * * by delivering a copy of the summons and of the complaint to an agent authorized by appointment * * * to receive service of process."

Statement

The basis for federal jurisdiction in the Court of first instance is based on diversity of citizenship. Title 28 U.S.C. Section 1332.

Petitioner, a Delaware corporation with its principal place of business in New York, is in the business of purchasing equipment on its customers' orders for leasing to the customers on terms and conditions set forth in a written lease agreement. Respondents, residents of Michigan, obtained farm equipment from plaintiff pursuant to such lease, the last paragraph of which read:

> "This agreement shall be deemed to have been made in Nassau County, New York, regardless of the order in which the signatures of the parties shall be affixed hereto, and shall be interpreted, and the rights and liabilities of the parties here determined, in accordance with the laws of the State of New York; and the Lessee hereby designates Florence Weinberg, 47-21 Forty-first Street, Long Island City, N. Y., as agent for the purpose of accepting service of any process within the State of New York."

On January 24, 1962, the United States Marshal delivered two copies of the summons and complaint to the respondents' designated agent, Florence Weinberg, who promptly mailed them to respondents with a covering letter explaining that they had been served upon her as the respondents' agent, in accordance with the provisions of the lease. On the same day, petitioner itself notified respondents by certified mail of the service of process on Florence Weinberg.

The District Court, although finding that the clause appointing such agent "was no fine print clause", and "abun-

dant actual notice of the service of process was promptly and punctiliously given in a manner that made the whole position plain to defendants at a glance," nevertheless held service invalid and quashed it on the ground that the lack of provision in the contract that the respondents be notified by the agent, of such service of process, rendered the provision therein, containing the appointment of person on whom process of service was to be served, ineffective.

The Court of Appeals for the Second Circuit, in affirming, determined that a provision for such notice would be essential to the validity of a state statute providing for substituted service on a statutory agent, but conceded that there is no such requirement when individuals freely contract for a method of substituted service.

Reasons for Granting the Writ

As stated by Judge Moore, in his dissenting opinion in the Court below:

> "* * * The Federal jurisdiction problem presented here is of the greatest commercial importance to merchants and consumers who engage in interstate business transactions. Furthermore, the opinion of the majority would appear to be in conflict with Kenny Construction Co. v. Allen, 248 F. 2d 656 (D. C. Cir. 1957) and Green Mountain College v. Levine, 120 Vt. 332, 139 A. 2d 882 (1958)."

Both the District Court and the Court of Appeals are in agreement that the law is well established that citizens of different states may agree in advance that any dispute arising out of the commercial transaction between them shall be subject to the jurisdiction of the Courts of a designated

state. *United States* v. *Balanovski*, 236 F. 2d 298 (2d Cir. 1956); *Kenny Construction Co.* v. *Allen*, 248 F. 2d 656 (D. C. Cir. 1957); *Erlanger Mills, Inc.* v. *Cohoes Fibre Mills, Inc.*, 39 F. 2d 502 (4th Cir. 1956); *Bowles* v. *J. J. Schmitt & Co., Inc.*, 170 F. 2d 617 (2d Cir. 1948); *Gilbert* v. *Burnstine*, 255 N. Y. 348, 174 N. E. 706 (1931); Restatement, Conflicts Sec. 81; Restatement, Judgments Sec. 18; cf *Adams* v. *Saenger*, 303 U. S. 59 (1938).

The contract herein was freely negotiated and executed, is unequivocal in its terms, required no construction and should, therefore, be enforced as executed.

Significantly, the contract provided that it was deemed to have been made in the State of New York and the rights and liabilities of the parties determined in accordance with the laws of the State of New York.

It was, in this connection, that provision was made for authorizing service of process upon a person in the State of New York.

In a recent proceeding in the Supreme Court of the State of New York, involving this petitioner, where an application was made to quash service, the court in *National Equipment Rental, Ltd.* v. *Graphic Art Design*, 234 N. Y. S. 2d 61 at 63, held:

> "Insofar as service of process is concerned, the question has been resolved by this court (Widlitz, J.) in National Equipment Rental, Ltd. v. Boright, N. Y. Law Journal, July 17, 1962, pgs. 8-9 in which, in construing a similar designation of an agent to receive service of process, the court said:
>
> 'The instant situation concerns contractual designation. The propriety of service in accordance

with an advance designation has been upheld in Gilbert v. Burnstine (255 N. Y. 348, 174 N. E. 706, 73 A.L.R. 1453), Emerson Radio & Phonograph Corporation v. Eskind (32 Misc. 2d 1038, 228 N. Y. S. 2d 841), National Equipment Rental, Ltd. v. Karlin (6 Misc. 2d 128, 166 N. Y. S. 2d 27)' Accordingly, to the extent that the motion seeks to set aside service of the summons as insufficient, it is denied.

"* * * Not only was the basic contract made in New York, but the parties stipulated that it should be interpreted and the rights and liabilities of the parties determined in accordance with the Laws of the State of New York, and the contract made provision for acquiring personal jurisdiction of the defendants in New York. Express stipulations in furtherance of business convenience or necessity and voluntarily made should not be lightly disregarded. Consents contained in the basic agreement necessarily implied that New York would be the forum for litigation. The intent of the parties thus expressed or implied will not be frustrated nor the plaintiff's choice of forum disturbed. (* * *)"

In *Gilbert* v. *Burnstine*, 255 N. Y. 348, the Court at 354, held:

"Contracts made by mature men who are not wards of the Court should, in the absence of potent objection, be enforced. Pretexts to evade them should not be sought. Few arguments can exist based on reason or justice or common morality which can be invoked for the interference with the compulsory performance of agreements which have been freely made. Courts should endeavor to keep the law at a grade at least as high as the standards of ordinary ethics. * * *"

The Court, quoting with approval from Scott Fundamentals of Procedures, pages 39-41, held:

> " 'Jurisdiction is conferred when the defendant enters a general appearance in an action, that is, an appearance for some purpose other than that of raising an objection of lack of jurisdiction over him. A stipulation waiving service has the same effect. The defendant may, before suit is brought, give a power of attorney to confess judgment or appoint an agent to accept service, or agree that service by any other method shall be sufficient. The defendant in all these cases has submitted to the control of the State and the Court over him.' "

The requirement by the Court below that the contract incorporate an intrinsic provision for reasonable notification in order to render the designation of agent enforceable, is in direct conflict with *Green Mountain College* v. *Levine*, 139 A. 2d 822, 120 Vt. 332; *Kenny Construction Co.* v. *Allan*, D. C. Cir. 1957, 248 F. 2d 656, in each of which case, the court held that the danger that the agent so designated might not forward notice to the defendants were risks that they took in appointing such agent. At the time of the execution of the contract, the respondents herein did not challenge any of its terms and in fact, had the respondents insisted on the elimination of the clause designating the agent, the petitioner would not have entered into the contract.

This Court in *Upton* v. *Tribilcock*, 91 U. S. 45, the Supreme Court held at page 50:

> "It will not do for a man to enter in a contract, and, when called upon to respond to its obligations to say that he did not read it when he signed, or did not know what it contained. If this were permitted con-

tracts would not be worth the paper on which they are written. Such is not the law. A contractor must stand by the words of his contract, and, if he will not read what he signs, he alone is responsible for his omission."

In *Hill* v. *Syracuse R. Co.*, 73 N. Y., the Court at 353 held:

"By accepting the contract without objection, the other party had a right to assume that he assented to its terms and the fact of not reading it cannot be interposed to prevent the legal effect of the transaction. Long v. N. Y. C. R. Co., 50 N. Y. 76; Belger v. Dinsmore, 37 N. Y. 166; Steers v. Liverpool etc. S. S. Co., 57 N. Y. 1; Magee v. C & R Tr. Co., 45 N. Y. 514."

In *Chicago R. Co.* v. *Belliwith*, 83 Fed. 437, the Court at 439 stated:

"A written contract is the highest evidence of the terms of an agreement between the parties to it, and it is the duty of every contracting party to learn and know its contents before he signs and delivers it. He owes this duty to the other party to the contract, because the latter may, and probably will, pay his money and shape his action in reliance upon the agreement. He owes it to the public, which, as a matter of public policy, treats the written contract as a conclusive answer to the question, what was the agreement?"

The appellant herein relied on all of the terms of the contract, paid its money for equipment specifically requested by appellees and appellees should be bound to all of the terms of the contract.

See also *Angerosa* v. *White Co.*, 290 N. Y. Supp. 204, 248 App. Div. 425, aff'd 275 N. Y. 524; *In re Smith's Estate*, 276 N. Y. Supp. 646, 243 App. Div. 348; *Charles F. Fields, Inc.* v. *American Hydratherm*, 174 N. Y. S. 2d 184, 5 App. Div. 2d 647.

The appellees, therefore, should be held to their contract as executed and service effected upon them should be held valid.

Process was effected exactly as required under Rule 4(d)(1) of the Rules of Civil Procedure. Actual notice of the service was given to the respondents. The effect of the decision of the Court below is to nullify the language of the rule and to deprive the petitioner of due process under the Fifth Amendment of the Constitution. Inasmuch as Rule 4(d)(1) of the Federal Rules of Civil Procedure does not require that the agent be under an obligation to send notice of services of process, an interpretation by the Court that it does require such notice does violence both to the unequivocal provision of the contract between the parties as well as to the letter of the rule.

The results of the construction placed upon this significant paragraph by the Court below was in effect, to make a new contract between the parties. The petitioner herein purchased the equipment leased to the respondents, predicated upon the contract and in reliance upon its ability to obtain jurisdiction over the respondents in Courts in its own local area. It would not have made the contract otherwise. By the construction placed upon the paragraph in question, the Court has effectively deprived the petitioner of its rights under contract without due process of law. Moreover, as pointed out in the dissenting opinion in the Court below:

> "To allow a defendant to insist upon what the majority here holds to be a defect in this privately drafted and voluntarily agreed to agency appointment, even though he has in no way been prejudiced thereby, is the essence of formalism. The purpose of service of process is to apprise the defendant that suit has been brought against him and to give him an opportunity to defend (citing cases). Once it is found that that purpose has been served, the inquiry should come to an end."

In the landmark case of *Pennoyer* v. *Neff*, 95 U. S. 714, 735, the Supreme Court held:

> "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them."

The result of the determination by the Court below is, in the words of the opinion of Judge Moore, dissenting therefrom to throw

> "in doubt the validity of countless provisions of a similar nature and throws the law into a state of confusion and uncertainty."

Since the contract provides "that the laws of the State of New York are applicable thereto" an examination of the decisions of the highest Court of the State of New York bear examination. They hold that a Court cannot make a new contract for the parties under the guise of interpreting the writing. *Central Union Trust Co.* v. *Trimble*, 255 N. Y. 88, 174 N. E. 72; *Western Union Telegraph Co.* v. *American Comm. Assoc.*, 299 N. Y. 177, 86 N. E. 2d 162.

Only where the language of the contract is ambiguous and uncertain and susceptible of more than one construction may the Court interfere to reach a proper construction of that which is uncertain.

The respondents themselves submitted no affidavits in support of their application to quash service, nor does the record reveal any personal claim on their behalf that they were imposed upon. *Friedman* v. *Handelman*, 300 N. Y. 188, 194, 90 N. E. 2d 31; *Graf* v. *Hope Building Corp.*, 254 N. Y. 1, 4, 171 N. E. 884; *Heller* v. *Pope*, 250 N. Y. 132, 164 N. E. 881; *Fleetash Realty Co.* v. *August Severio Construction Co.*, 21 Misc. 2d 350, 188 N. Y. S. 2d 714, 716, aff'd. 11 A. D. 2d 769, 205 N. Y. S. 2d, 212; *Frankel* v. *Tremont Norman Motors Corp.*, 21 Misc. 2d 20, 193 N. Y. S. 2d 722, 725, aff'd. 10 A. D. 2d 680, 197 N. Y. S. 2d 576, aff'd. 8 N. Y. 2d 901, 168 N. E. 2d 823. The Court must construe an agreement as made and may not make a new agreement by construction. *Sandberg* v. *Reilly*, 223 A. D. 57, 227 N. Y. S. 418. Parties may make their own bargains and they should be held to the terms of their agreement. *Cohen* v. *E. & J. Bass*, 246 N. Y. 270, 158 N. E. 618. A poor bargain may not be made good by judicial construction or recasting of the contract since it is a fair and reasonable assumption that a party has made what he believed to be the best bargain which he could obtain in his own interest. *Lexington Holding Corporation* v. *Holman*, 189 N. Y. S. 2d 269, 270. Where the intention of the parties, as in the case at bar, is clear and unambiguously set forth, effect must be given to the intent as indicated by the language used. *Delancy Kosher Restaurant and Caterer Corporation* v. *Gluckstern*, 305 N. Y. 250, 256, 112 N. E. 2d 276. The intention of the parties is found in the language used to express such intention. *Nau* v. *Vulcan Rail & Con-*

struction Co., 286 N. Y. 188, 198, 199, 36 N. E. 2d 106. The agreement of the parties is to be ascertained from the plain language used by them no matter what the intention may have been. Presumptively, the intention of the parties to contract is expressed by the natural and ordinary meaning of their language referable to it and such meaning cannot be perverted or destroyed by the Courts through construction. *Gans* v. *Aetna Life Insurance Co.*, 214 N. Y. 326, 108 N. E. 443. The law presumes that the parties understood the import of their contract and that they had the intention which its terms manifested. *Cream of Wheat Co.* v. *Arthur H. Crist Co.*, 222 N. Y. 487, 493, 494, 119 N. E. 74.

If private contracts which are not in conflict with the public policy of the States or National are to be inhibited by judicial construtions, the entire concept of free interstate commerce will be frustrated. The decision of the Court below is a deterrant to interstate commerce.

An additional ground for granting certiorai is that the decision of the court below is in conflict with the decision of the Court of Appeals for the District of Columbia in *Kenny* v. *Allen, supra,* and with the decision of the highest Court of the State of Vermont in *Green Mountain College* v. *Levine, supra. Patterson* v. *U. S.*, 79 S. Ct. 936, 359 U. S. 495; *Robert C. Herd & Co.* v. *Crawill Machinery Corp.*, 79 S. Ct. 763, 359 U. S. 297; *Mitchell* v. *Kentucky Finance Co.*, 79 S. Ct. 756, 359 U. S. 290; *U. S.* v. *Embassy Restaurant, Inc.*, 79 S. Ct. 554, 359 U. S. 29; *Romero* v. *International Terminal Operating Co.*, 79 S. Ct. 468, 358 U. S. 354.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILBUR G. SILVERMAN
Attorney for Petitioner
88-11 169th Street
Jamaica 32, N. Y.

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 21—October Term, 1962

(Argued October 11, 1962 Decided December 6, 1962)

Docket No. 27486

NATIONAL EQUIPMENT RENTAL, LTD.,
Plaintiff-Appellant,

v.

STEVE SZUKHENT and ROBERT SZUKHENT,
Defendants-Appellees.

Before:

CLARK, MOORE and SMITH, *Circuit Judges.*

Appeal from an order of the United States District Court for the Eastern District of New York, John F. Dooling, Jr., D. J., quashing service of summons and complaint on non-resident defendants in action on a farm equipment lease.

Affirmed.

WILBUR G. SILVERMAN, Jamaica, New York, *for plaintiff-appellant.*

HARRY R. SCHWARTZ, Brooklyn, New York, *for defendants-appellees.*

SMITH, *Circuit Judge*:

Defendants, residents of Michigan, obtained farm equipment in Michigan on a lease from plaintiff, a Delaware Corporation with its principal place of business in New York. Claiming default, plaintiff sued for payments under the lease in the Eastern District of New York, the marshal delivering two copies of the summons and complaint to one Florence Weinberg as agent designated in the lease for the purpose of accepting process for defendants in the State of New York. The copies were promptly forwarded by Weinberg to defendants by mail with a covering letter under an agreement between Weinberg and plaintiff to perform this service without compensation. Nothing in the lease required notice to defendants. Plaintiff also notified defendants by mail promptly on the purported service of the process. The United States District Court for the Eastern District of New York, John F. Dooling, Jr., D. J., held the service invalid and quashed the service. Plaintiff appeals. We agree with the District Court that no valid agency of Weinberg for defendants was created by the instrument in suit and affirm the order.

The lease contract here was on a printed form provided by plaintiff. There is no requirement in the purported appointment of the agent for any notice to defendants. A provision for notice would be essential to the validity of a state statute providing for substituted service on a statutory "agent". *Wuchter* v. *Pizzutti*, 276 U. S. 13 (1928). There is no such requirement when individuals freely contract for a method of substituted service. Lack of such a provision in a contract of adhesion, here involved,

may, however, be considered in determining the meaning and effect of the provisions of the contract. There is no provision in the lease for any undertaking by the purported agent to act for, or give notice to her purported principal. Normally, an agency exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act, Restatement Agency § 15, and the agent is subject to control by the principal, Restatement Agency § 1. Plaintiff's affidavits demonstrate that Weinberg was acting under an agreement with and supervision of the plaintiff, having undertaken no obligations to defendants, to whom she was unknown. Defendants never dealt with her and had no indication of any undertaking on her part to act as their agent until receipt of the process many months later. The court properly held such a purported appointment unreal and ineffective to create a genuine agency of Weinberg for defendants.

Plaintiff might have provided, with defendants' agreement, that service or notice be waived or that notice be given by plaintiff. See *Bowles* v. *J. J. Schmitt & Co.*, 170 F. 2d 617, 622 (2 Cir. 1948), *Gilbert* v. *Burnstine*, 255 N. Y. 348, 174 N. E. 706 (1931). This would, however, have required defendants' consent, which might or might not have been forthcoming. The illusory purported agency provision, however, is properly held ineffective to subject defendants to suit in New York.

Affirmed.

MOORE, *Circuit Judge* (dissenting)

The question here presented goes so much beyond the facts of this particular case that I believe my contrary view should be stated. After all, it may be said, who (except this plaintiff, of course) cares whether a Michigan farmer pays for machinery he has leased in New York? However, the federal jurisdiction problem presented here is of the greatest commercial importance to merchants and consumers who engage in interstate business transactions. Furthermore, the opinion of the majority would appear to be in conflict with *Kenny Construction Co.* v. *Allen*, 248 F. 2d 656 (D. C. Cir. 1957) and *Green Mountain College* v. *Levine*, 120 Vt. 332, 139 A. 2d 882 (1958).

Plaintiff, a Delaware corporation with its principal place of business in New York, is in the business of purchasing equipment on its customers' orders for leasing to the customers on terms and conditions set forth in an instrument denominated a lease. Defendants, residents of Michigan, obtained farm equipment from plaintiff pursuant to such a lease, the last operative clause of which read:

> "* * * and the Lessee hereby designates Florence Weinberg, 47-21 Forty-First Street, Long Island City, New York, as agent for the purpose of accepting service of any process within the State of New York."

Plaintiff, alleging default under the lease, commenced this action in the Eastern District of New York. The Marshal delivered two copies of the summons and complaint to defendants' designated agent, Florence Weinberg, who

promptly mailed them to defendants with a covering letter, explaining that they had been served upon her as the defendants' agent in accordance with the provisions of the lease. On the same day, plaintiff itself notified defendants by certified mail of the service of process on Florence Weinberg. Twenty-two days after this service, counsel for defendants notified plaintiff's attorney that he was appearing specially to set aside the service of the summons and complaint. The District Court held the service invalid and quashed it.

The clause appointing the agent was no fine print clause buried in an oppressively long and complex instrument. The entire contract is only 1¼ pages long and the agency provision is in the last paragraph appearing directly above defendants' signatures. The clause was included in the contract for the purpose of subjecting defendants to suit in the courts[1] in New York and for no other purpose. Without such a clause plaintiff might well have refused to make the contract. To carry a New York obtained judgment to the other forty-nine States for enforcement is quite a different matter than trying lawsuits and engaging counsel for this purpose in these other States.

The trial court found that is was plaintiff's established practice to assure that prompt notice was sent to defendants of any action it brought against them. That citizens of different states may agree in advance that any disputes arising out of a commercial transaction between them shall be subject to the jurisdiction of the courts of a designated

1 Such an agency designation would not subject the defendants to the jurisdiction of the courts of the State of New York. *Rosenthal* v. *United Transp. Co.*, 196 App. Div. 540, 188 N. Y. S. 154 (App. Div. 1921).

state is well established. *United States* v. *Balanovski*, 236 F. 2d 298 (2d Cir. 1956); *Kenny Construction Co.* v. *Allen*, 248 F. 2d 656 (D. C. Cir. 1957); *Erlanger Mills, Inc.* v. *Cohoes Fibre Mills, Inc.*, 239 F. 2d 502 (4th Cir. 1956); *Bowles* v. *J. J. Schmitt & Co., Inc.*, 170 F. 2d 617 (2d Cir. 1948); *Gilbert* v. *Burnstine*, 255 N. Y. 348, 174 N. E. 706 (1931); Restatement, Conflicts § 81; Restatement, Judgments § 18; *cf Adams* v. *Saenger*, 303 U. S. 59 (1938).

The only question presented by this appeal[2] therefore is whether the service made on Florence Weinberg is service on "an agent authorized by appointment * * * to receive service of process" within the meaning of Rule 4(d) (1) of the Federal Rules of Civil Procedure.[3] The majority's strained serch for the contract's "meaning" and "effect", and their invocation of *Wuchter* v. *Pizzutti*, 276 U. S. 13 (1928) to provide the unexpressed intendment of the parties do not obliterate the federal nature[4] of the question being here decided. Although my colleagues do not expressly

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2 Since there was jurisdiction of the present suit solely on the ground of diversity of citizenship and since the suit was brought in the district of the plaintiff's residence, there was, by virtue of § 1391 of the Judicial Code, no want of venue and the district court was not warranted in dismissing the suit if the service of summons was effective to make the defendant a party. For a similar situation see *Mississippi Publishing Corp.* v. *Murphree*, 326 U. S. 438 (1945).

3 The agency appointment in question was framed to a large extent in the language of that Rule. The Rule, in pertinent part, reads as follows:

> (4) (d) * * * Service shall be made as follows:
>
> (1) Upon an individual * * * by delivering a copy of the summons and of the complaint *to an agent authorized by appointment* or by law *to receive service of process*. (Emphasis added.)

4 See *Bowles* v. *J. J. Schmitt & Co., Inc.*, 170 F. 2d 617 (2d Cir. 1948).

evince a desire to remove Rule 4(d) (1) from the books entirely, they not only substantially rewrite the Rule but also write for the parties a contract into which they probably never would have entered.

The majority initially concede that the constitutionally dictated requirements of *Wuchter* v. *Pizzuti*, *supra*, do not apply to contracts entered into by individuals. Then, in the guise of construing the contract in question, they read those same requirements into Rule 4(d) (1). That this is the effect of their decision is made clear by their concern that "there is no provision in the lease for any undertaking by the purported agent to * * * give notice to her purported principal." In *Wuchter*, the Supreme Court held invalid the non-resident motorist statute in question because "the statute of New Jersey * * * does not make provision for communication to the proposed defendant." Rule 4(d) (1) is now construed to mean that any agency arrangement that does not impose upon the designated agent a contractually unassailable duty to send notice is not sufficient to subject the appointing party to the personal jurisdiction of the courts of the designated state. The fact that notice was actually given is held to be of no consequence.

The Supreme Court, in *Wuchter*, declared that in those situations in which a State may subject a non-resident individual to the jurisdiction of its courts other than through personal service within the State, due process requires that the statutory scheme provide a means of service reasonably calculated to apprise the defendant of the proceedings against him. Compare *Wuchter*, *supra*, with *Hess* v. *Pawlowski*, 274 U. S. 352 (1927). See *McGee* v. *International*

Life Insurance Co., 355 U. S. 220 (1957); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950). In that case the Court was dealing with the limitations on the coercive powers of the States imposed by the due process clause of the Fourteenth Amendment, and not with arrangements for service of process voluntarily agreed to by individuals. As Cardozo, J., said in related context, "The distinction is between a true consent and an imputed or implied consent, between a fact and a fiction." *Bagdon* v. *Philadelphia & Reading Coal & Iron Co.*, 217 N. Y. 432, 437 (1916). See L. Hand, D. J., in *Smolik* v. *Philadelphia & Reading Coal & Iron Co.*, 222 Fed. 148 (S. D. N. Y. 1915). The demise of the implied consent theory serves only to accentuate that distinction, namely, between a voluntary and a forced subjection to the jurisdiction of the courts of a state.

Actual notice by an agent authorized by appointment to receive service of process should be dispositive. The reasoning of Justices Brandeis' and Holmes' dissent in *Wuchter* is, in the context of Rule 4(d) (1), compelling:

> "Notice was in fact given. And it was admitted at the bar that the defendant had, at all times, actual knowledge and the opportunity to defend. The cases cited by the Court as holding that he could deliberately disregard that notice and opportunity and yet insist upon a defect in the statute as drawn, although he was in no way prejudiced thereby, seem hardly reconcilable with a long line of authorities." 276 U. S. at page 28.

To allow a defendant to insist upon what the majority here holds to be a defect in this privately drafted and voluntarily agreed to agency appointment, even though he has in no way been prejudiced thereby, is the essence of form-

alism. The purpose of service of process is to apprise the defendant that suit has been brought against him and to give him an opportunity to defend. *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945); *Wuchter* v. *Pizzutti*, *supra*; *Grooms* v. *Greyhound Corp.*, 287 F. 2d 95 (6th Cir. 1961); *Tarbox* v. *Walters*, 192 F. Supp. 816 (E. D. Pa. 1961); *American Football League* v. *National Football League*, 27 F. R. D. 264 (D. Md. 1961). Once it is found that that purpose has been served, the inquiry should come to an end.

I do not reach the question whether actual receipt of notice by the defendant is always required because here notice was received. If the agent is the nominee of the defendant, plausible argument has been made that service of process is valid even though notice is not forwarded to the defendant. *Kenny Construction Co.* v. *Allen*, 248 F. 2d 656 (D. C. Cir. 1957); *Green Mountain College* v. *Levine*, 120 Vt. 332, 139 A. 2d 822 (1958).

In considering this question, the Vermont court said:

> "The capacity of the Secretary of State to accept the appointment and the danger that he might not forward notice to the defendants were risks which they took in appointing him. Restatement Agency § 21." 120 Vt. at page 336.

Also apropos here are the words of the Supreme Court in the landmark case of *Pennoyer* v. *Neff*, 95 U. S. 714, 735 (1877):

> "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notifica-

tion has been followed, even though he may not have actual notice of them."

The rationale of the majority opinion would, however, extend even to the case posited. They require that the authorization to receive service of process intrinsically provide that the agent be bound to forward notice to the defendant. If, for example, defendants in the present action had selected Florence Weinberg themselves but no consideration ran to her or some other contractual infirmity existed, they would hold that service on her was invalid because she was under no obligation, no binding undertaking, to forward notice. And yet they actually go so far as to concede that a contract providing for no notice at all would have been permissible. Also implicit in the majority opinion is the thought that an appointed agent must be presumed to be faithless to his obligation and that some compensation must be paid by the principal for the services. If these are to be the legal consequences, then precautionary steps should be taken to require that the contract provide for a certificate from the agent is substances as follows: "I, Florence Weinberg, hereby agree for good and valuable consideration by me received from the Lessee, faithfully to perform my agency duties and to forward forthwith by registered mail any papers served on me."

At the heart of the majority opinion there seems to lie a mistrust of the agency provision in question because it might be construed to permit the entry of a default judgment with no notice being provided the defendants.[5] Hard

5 If it should be deemed necessary in this case to engage in contract interpretation, I believe that the far more reasonable and realistic view of this agency provision, in view of the plaintiff's firmly established practice, would be one requiring that notice

cases may make bad law but easy cases, misconceived to be hard ones, make even worse law because in the latter there is not even the seeming justification attendant the former.

Defendants here received all they were entitled to. They agreed to submit to the jurisdiction of the courts in New York and that is all plaintiff required them to do. No default judgment is contemplated; they receive adequate notice of the suit pending against them and were afforded ample opportunity to defend. In order to relieve them of this obligation which they voluntarily incurred, the majority throws in doubt the validity of countless provisions of a similar nature and throws the law into a state of confusion and uncertainty. If, as the majority seem to fear, this agency provision can be used as a vehicle of oppression and overreaching, I suggest that we wait until such a case is presented to us. The same Federal Rules that provide for service of process upon an agent authorized to receive such service also contain provision for the setting aside of default judgments, Rule 55(c), and for relieving a party from a final judgment, Rule 60(b). I cannot bring myself to believe that the federal courts would not, in such a case, use the above rules to good advantage.

I would require the parties to abide by their contract and would reverse the district court.

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be given the defendants, if not by the agent, then by the principal. See the dissents of Justices Brandeis, Holmes and Stone in *Wuchter* v. *Pizzutti*, 276 U. S. 13, at pages 25 and 28. If proof of such notice were not forthcoming, the service of process would be properly quashed.

The nub of my disagreement with the majority, of course, is they read into Rule 4(d) (1) the requirement that the agent be under an unassailable obligation to send notice, regardless of whether notice is actually sent by the agent, by the plaintiff, or as here, by both.

IN THE

Supreme Court of the United States

October Term, 1962

No. 81

NATIONAL EQUIPMENT RENTAL, LTD.,
Petitioner,

—against—

STEVE SZUKHENT and ROBERT SZUKHENT,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE BANKS NAMED BELOW FOR LEAVE TO FILE THE ACCOMPANYING BRIEF AS AMICI CURIAE IN SUPPORT OF THE PLAINTIFF-APPELLANT'S PETITION FOR A WRIT OF CERTIORARI

DAVID HARTFIELD, JR.
Counsel for: Bankers Trust Co.
14 Wall Street
New York 5, New York

JOHN D. CALHOUN
Counsel for: Chemical Bank New York Trust Co.
1 Chase Manhattan Plaza
New York 5, New York

BENJAMIN C. MILNER, III
Counsel for: Manufacturers Hanover Trust Co.
120 Broadway
New York 5, New York

ROY C. HABERKERN, JR.
Counsel for: The Chase Manhattan Bank
1 Chase Manhattan Plaza
New York 5, New York

MERRELL E. CLARK, JR.
Counsel for: Irving Trust Co.
40 Wall Street
New York 5, New York

HENRY L. KING
Counsel for: Morgan Guaranty Trust Company of New York
The Bank of New York
1 Chase Manhattan Plaza
New York 5, New York

Of Counsel:
WHITE & CASE
MILBANK, TWEED, HADLEY & MCCLOY
CRAVATH SWAINE & MOORE
WINTHROP STIMSON PUTNAM & ROBERTS
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IN THE

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Motion

The undersigned banks in the City of New York hereby respectfully move for leave to file the accompanying brief, *amicus curiae* in support of the plaintiff-appellant's petition for a writ of certiorari. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the defendant-respondent was requested but refused.

The Decision Below

In the instant case, the Court of Appeals for the Second Circuit, in a two-to-one decision, held that a designation by a non-resident of a local agent to receive service of process in New York was invalid for lack of an express agreement by the agent to act as such and to notify the principal of the receipt of any process.

Interest of the Undersigned Banks

The interest of the undersigned banks in this case arises from the fact that they are engaging and have engaged in numerous financing, banking and fiduciary transactions, national and international. These transactions take a great variety of forms, of which a few examples are: notes, revolving credit agreements, loan agreements, guarantees, bond and debenture indentures, escrow agreements, fiscal agency appointments and the like. Also, the banks make loans on the security of the assignment of rentals payable under chattel leases of the kind here involved.

In a considerable number of these instruments, particularly those involving borrowers and other customers in foreign countries, there is a clause, similar to the clause under consideration in this case, whereby the customer designates an agent for the service of process in New York. The agent is usually designated in terms of his official capacity, rather than by name. For instance, there are designations of agents in terms of "the Consul General of Canada in New York", "the Secretary of the X Bank", "any partner in the law firm of A, B and C". If the opinion of the Court of Appeals requires, as it appears to, that the agent

indicate his consent at the time of the appointment, that requirement is impossible to satisfy when the agent is designated by office rather than by name. If the opinion means that the consent may be given subsequently by each successive incumbent of the office, the requirement is not only unduly burdensome but presents the very real danger that the incumbent will be unaware of, or will overlook, the need to express his consent to the principal. In those cases where the agent is designated by name, express consent by the agent to act as such is probably the exception rather than the rule.

Questions of Law and Fact that May Not Adequately Be Presented by the Parties

The undersigned believe that there are at least three relevant issues of fact and law which they can submit to this Court over and above the material that has been, and apparently will be, submitted by the Petitioner.

First, as indicated above, the undersigned have daily and firsthand knowledge of the great practical utility in commercial and financial transactions of the designation of a local agent to receive service of process, the wide variety of the situations in which this practice is used and the unwarranted damage that the instant decision would do to this practice.

Second, the undersigned have noted that the rules of the law of agency, particularly the *Restatement 2d*, as applied to the designation of an agent to receive service of process, were not discussed in the briefs of the parties in the Court of Appeals or in the Petition for Certiorari, although the *Restatement* was the principal authority relied on by the

majority in the decision below. Since we believe that the court below applied incorrect agency principles, we request the opportunity to brief this Court on the subject.

Third, there are numerous instances in which non-resident persons are required, by administrative rule, to designate a local agent to receive service of process or to receive service of formal papers akin to process. For example, the Securities and Exchange Commission requires the inclusion in each Registration Statement of the name and address of an agent for service (Form S-1); it requires in each application for registration as a broker or dealer, and in each application for registration as an investment adviser, a consent by the applicant that notice of any proceeding before the Commission may be served on a person designated by the applicant (Forms BD and ADV). None of these forms provides for any expression of consent by the person so designated.

BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Reasons for Granting the Writ

In holding invalid a provision in a chattel lease appointing a third person, not a party to the lease, agent of the lessee to receive process in any action arising out of the lease, the Court of Appeals for the Second Circuit placed an unwarranted interpretation on Rule 4(d) of the Federal Rules of Civil Procedure, and decided a question of law which is of major importance to the financial and business communities in a manner inconsistent with well established patterns of business and in conflict with principles of law established by other courts.

The court below, Judge Moore dissenting, decided that Rule 4(d) requires that an agent appointed to receive process specifically undertake to act as agent, and specifically undertake to give notice to his principal that the agent has been served with process on behalf of the principal. It is not clear from the opinion at exactly what time the agent's consent must be given. It is clear that the majority of the Court held that there is no effective agency until the agent has expressed his consent and, more important, that action under the appointment is not a sufficient consent.

So far as we have been able to determine, this is the first case in which the appointment of an agent to receive service of process has been invalidated.

Paragraphs (1) and (3) of Rule 4(d) provide that service of process upon an individual, corporation, partnership

or unincorporated association may be made on "an agent authorized by appointment or by law to receive service of process". By the terms of the lease, Weinberg was appointed agent of the lessee. She acted as such by receiving the process and promptly forwarding a copy to her nonresident principals, the defendants. This is true even though she did not specifically undertake to act as agent for the lessee. The agency relationship of course is consensual, but the agent's consent may be in the form of the required act rather than an agreement to perform the required act.

The sole affirmative authority relied upon by the majority below was the *Restatement of Agency*, §§ 1 and 15.* The misinterpretation, in the majority opinion, of this fundamental text may amount to a drastic re-writing of one of the basic rules of the law of agency. Comment a to Section 1 contains the statement, "the agent must act or agree to act on the principal's behalf and subject to his control." The three Illustrations to Section 15 are precisely in point; they all involve cases where the agent acts without otherwise communicating his consent to the principal. Comment a to Section 26 states categorically: "It is not essential to the existence of authority that there be a contract between the principal or agent or that the agent promise or otherwise undertake to act as agent." The majority below appear to have been concerned by the fact that the agent was unknown to the defendants at the time of her appointment and that the defendants had never dealt with her. Comment b to Section 26 states that the manifestations by the principal to the agent can be made by the principal directly, or by any means intended to cause the agent to believe that he is authorized. That was the situation in the present case.

* In this Brief, all citations to the *Restatement* are to the Second Edition (1958).

For the reasons set forth in the preceding Motion, to require an agent to give a specific undertaking to act would upset well-settled procedures in important transactions in the financial and business communities. It would also become a trap for the many lawyers and business men who are not aware of the decision of the Court of Appeals in this case.

The court below, in addition to misinterpreting the applicable agency law also interpreted Rule 4(d)(1) and (3) as requiring the designated agent to undertake to give notice to his principal of any future service of process. This is not required by the language of the Rule, and this interpretation is in direct conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Kenny Construction Co.* v. *Allen*, 248 F. 2d 656 (1957), where a contract provision similar to the one under discussion, with no requirement for the giving of notice to the principal, was held to be valid—even in favor of a person who was not a party to the contract.

In addition to this conflict in decisions, there is the additional point that the court below decided an issue of far-reaching importance which was not properly before it. While holding that there must be an undertaking by the agent to give notice of service of process to the principal and that because of such requirement the service in the case was invalid, the court held that the fact that in this case notice in fact was given was irrelevant. Notice was given, so there could be no denial of due process. The court rested its conclusion on *Wuchter* v. *Pizzutti*, 276 U. S. 13 (1928), a case which decided that a state non-resident motorist statute was unconstitutional since it did not require the statutory agent to give notice to the defendant. This Court reached that result even though notice was in fact given,

on the ground that (276 U. S. at 24) "Not having been directed by the statute it cannot, therefore, supply constitutional validity to the statute or to service under it; . . ." But in the present case, the court below recognized that a provision for notice is not necessary when individuals freely contract. The difference between the two situations is manifest. *Wuchter* involved an agency forced upon the "principal" by statute and necessarily raised the important constitutional question of due process to the "principal". In the case at bar, the only issue is the effectiveness of the service pursuant to contract, and this issue does not bring into play any question as to the constitutionality of a statute. It is merely an issue of what was in fact done. In fact, notice was given, and there was a valid appointment of an agent. These two factors should have foreclosed the issue from the court's consideration. As Professor Moore states:

> "The phrase 'an agent authorized by appointment to receive service of process' is intended to cover the situation where an individual actually appoints an agent for that purpose. No question of due process arises with respect to service upon an agent in such a situation." Moore's *Federal Practice*, 2d ed. ¶ 4.12, p. 931.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated New York, N. Y.
March 15, 1963.

Respectfully submitted,

DAVID HARTFIELD, JR.
Counsel for: Bankers Trust Co.
14 Wall Street
New York 5, New York

ROY C. HABERKERN, JR.
Counsel for: The Chase Manhattan Bank
1 Chase Manhattan Plaza
New York 5, New York

JOHN D. CALHOUN
Counsel for: Chemical Bank New York Trust Co.
1 Chase Manhattan Plaza
New York 5, New York

MERRELL E. CLARK, JR.
Counsel for: Irving Trust Co.
40 Wall Street
New York 5, New York

BENJAMIN C. MILNER, III
Counsel for: Manufacturers Hanover Trust Co.
120 Broadway
New York 5, New York

HENRY L. KING
Counsel for: Morgan Guaranty Trust Company of New York
The Bank of New York
1 Chase Manhattan Plaza
New York 5, New York

Of Counsel:

WHITE & CASE
MILBANK, TWEED, HADLEY & MCCLOY
CRAVATH SWAINE & MOORE
WINTHROP STIMSON PUTNAM & ROBERTS
SIMPSON THACHER & BARTLETT
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IN THE

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October Term, 1962

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NATIONAL EQUIPMENT RENTAL, LTD.,

Petitioner,

—against—

STEVE SZUKHENT and ROBERT SZUKHENT,

Respondents.

PETITIONER'S BRIEF ON APPEAL

WILBUR G. SILVERMAN,
Attorney for Petitioner
88-11 169th Street
Jamaica 32, N. Y.

12 CASE PRESS INC., 421 Hudson St., N. Y.—ORegon 5-4540

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NATIONAL EQUIPMENT RENTAL, LTD.,

Petitioner,

—against—

STEVE SZUKHENT and ROBERT SZUKHENT,

Respondents.

PETITIONER'S BRIEF ON APPEAL

Opinions Below

United States District Court for the Eastern District of New York, Dooling, J., rendered an opinion and order entered in the office of the Clerk of the United States District Court for the Eastern District of New York on March 19, 1962, reported in 30 FRD 3.

United States Court of Appeals for the Second Circuit rendered an opinion dated December 6, 1962, reported in 311 F. 2d 79.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was dated December 6, 1962, and the mandate entered in the office of the Clerk of United States

District Court for the Eastern District of New York on the 27th day of December 1962. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Constitutional and Statutory Provisions Involved

1. United States Constitution, Amendment V:

> "* * * nor shall any person * * *, be deprived of life, liberty or property, without due process of law; * * *."

2. Federal Rules of Civil Procedure, Rule 4 (d) (1):

> "(d) Summons: Personal Service * * *. Service shall be made as follows:
>
> (1) Upon an individual * * * by delivering a copy of the summons and of the complaint to an agent authorized by appointment * * * to receive service of process."

Question Presented

Was valid service of process effected upon the respondents by the service of the summons and complaint upon the person nominated and designated as their process agent in a written contract when actual notice of such service was given by both process agent and petitioner, even though the contract contained no provision requiring such notice.

Statement

The basis for federal jurisdiction in the Court of first instance is based on diversity of citizenship. Title 28 U.S.C. Section 1332.

Petitioner, a Delaware corporation with its principal place of business in New York, is in the business of purchasing equipment on its customers' orders for leasing to the customers on terms and conditions set forth in a written lease agreement. Respondents, residents of Michigan, obtained farm equipment from plaintiff pursuant to such lease, the last paragraph of which read:

> "This agreement shall be deemed to have been made in Nassau County, New York, regardless of the order in which the signatures of the parties shall be affixed hereto, and shall be interpreted, and the rights and liabilities of the parties here determined, in accordance with the laws of the State of New York; and the Lessee hereby designates Florence Weinberg, 47-21 Forty-first Street, Long Island City, N. Y., as agent for the purpose of accepting service of any process within the State of New York."

On January 24, 1962, the United States Marshal delivered two copies of the summons and complaint to the respondents' designated agent, Florence Weinberg, who promptly mailed them to respondents with a covering letter explaining that they had been served upon her as the respondents' agent, in accordance with the provisions of the lease. On the same day, petitioner itself notified respondents by certified mail of the service of process on Florence Weinberg.

The District Court, although finding that the clause appointing such agent "was no buried fine print clause", and "abundant actual notice of the service of process was promptly and punctiliously given in a manner that made the whole position plain to defendants at a glance" (R. 3a), nevertheless held service invalid and quashed it on the ground that the lack of provision in the contract that the

respondents be notified by the agent, of such service of process, rendered the provision therein, containing the appointment of person on whom process of service was to be served, ineffective.

The Court of Appeals for the Second Circuit, in affirming, determined that although a provision for such notice would be essential to the validity of a state statute providing for such substituted service on a statutory agent, conceded that there is no such requirement when individuals freely contract for a method of substituted service.

ARGUMENT

1. Service of process was effected in accordance with Rule 4 (d) (1) of the Federal Rules of Civil Procedure by serving a person designated to receive service of process in a contract freely negotiated and executed.

The contract was freely negotiated and executed, is unequivocal in its terms, required no construction and should, therefore, be enforced as executed.

The law is well established that citizens of different states may agree in advance that any dispute arising out of the commercial transaction between them shall be subject to the jurisdiction of the Courts of a designated state. *United States* v. *Balanovski*, 236 F. 2d 298 (2d Cir. 1956); *Kenny Construction Co.* v. *Allen*, 248 F. 2d 656 (D.C. Cir. 1957); *Erlanger Mills, Inc.* v. *Cohoes Fibre Mills, Inc.*, 39 F. 2d 502 (4th Cir. 1956); *Bowles* v. *J. J. Schmitt & Co., Inc.*, 170 F. 2d 617 (2d Cir. 1948); *Gilbert* v. *Burnstine*, 255 N. Y. 348, 174 N.E. 706 (1931); Restatement, Conflicts Sec. 81; Re-

statement, Judgments Sec. 18; cf *Adam* v. *Saenger*, 303 U. S. 59 (1938).

Significantly, the contract provided that it was deemed to have been made in the State of New York and the rights and liabilities of the parties determined in accordance with the laws of the State of New York.

It was, in this connection, that provision was made for authorizing service of process upon a person in the State of New York.

In a recent proceeding in the Supreme Court of the State of New York, involving this petitioner, where an application was made to quash service, the court in *National Equipment Rental, Ltd.* v. *Graphic Art Design*, 234 N. Y. S. 2d 61 at 63 held:

> "Insofar as service of process is concerned, the question has been resolved by this court (Widlitz, J.) in National Equipment Rental, Ltd. v. Boright, N. Y. Law Journal, July 17, 1962, pgs. 8-9 in which, in construing a similar designation of an agent to receive service of process, the court said:
>
> 'The instant situation concerns contractual designation. The propriety of service in accordance with an advance designation has been upheld in Gilbert v. Burnstine (255 N. Y. 348, 174 N.E. 706, 73 A.L.R. 1453), Emerson Radio & Phonograph Corporation v. Eskind (32 Misc. 2d 1038, 228 N. Y. S. 2d 841), National Equipment Rental, Ltd. v. Karlin (6 Misc. 2d 128, 166 N. Y. S. 2d 27).' Accordingly, to the extent that the motion seeks to set aside service of the summons as insufficient, it is denied.
>
> " • • • Not only was the basic contract made in New York, but the parties stipulated that it should be interpreted and the rights and liabilities of the par-

ties determined in accordance with the Laws of the State of New York, and the contract made provision for acquiring personal jurisdiction of the defendants in New York. Express stipulations in furtherance of business convenience or necessity and voluntarily made should not be lightly disregarded. Consents contained in the basic agreement necessarily implied that New York would be the forum for litigation. The intent of the parties thus expressed or implied will not be frustrated nor the plaintiff's choice of forum disturbed. (* * *)."

In *Gilbert* v. *Burnstine*, 255 N. Y. 348, the Court at 354, held:

"Contracts made by mature men who are not wards of the Court should, in the absence of potent objection, be enforced. Pretexts to evade them should not be sought. Few arguments can exist based on reason or justice or common morality which can be invoked for the interference with the compulsory performance of agreements which have been freely made. Courts should endeavor to keep the law at a grade at least as high as the standards of ordinary ethics. * * *."

The Court, quoting with approval from Scott Fundamentals of Procedures, pages 39-41, held:

"'Jurisdiction is conferred when the defendant enters a general appearance in an action, that is, an appearance for some purpose other than that of raising an objection of lack of jurisdiction over him. A stipulation waiving service has the same effect. The defendant may, before suit is brought give a power of attorney to confess judgment or appoint an agent to accept service, or agree that service by any other

> method shall be sufficient. The defendant in all these cases has submitted to the control of the State and the Court over him.' "

The requirement by the Court below that the contract incorporate an intrinsic provision for reasonable notification in order to render the designation of an agent enforceable, is in direct conflict with *Green Mountain College* v. *Levine*, 139 A. 2d 822, 120 Vt. 332; *Kenny Construction Co.* v. *Allan*, D.C. Cir. 1957, 248 F. 2d 656, in each of which cases, the court held that the danger that the agent so designated might not forward notice to the defendants were risks that they took in appointing such agent.

See also *Patterson* v. *U. S.*, 79 S. Ct. 936, 359 U. S. 495; *Robert C. Herd & Co.* v. *Crawill Machinery Corp.*, 79 S. Ct. 763, 359 U. S. 297; *Mitchell* v. *Kentucky Finance Co,*, 79 S. Ct. 756, 359 U. S. 29; *Romero* v. *International Terminal Operating Co.*, 79 S. Ct. 468, 358 U. S. 354.

At the time of the execution of the contract, the respondents herein did not challenge any of its terms and in fact, had the respondents insisted on the elimination of the clause designating the agent, the petitioner would not have entered into the contract.

This Court in *Upton* v. *Tribilcock*, 91 U. S. 45, the Supreme Court held at page 50:

> "It will not do for a man to enter into a contract, and, when called upon to respond to its obligations to say that he did not read it when he signed, or did not know what it contained. If this were permitted contracts would not be worth the paper on which they are written. Such is not the law. A contractor must stand by the words of his contract, and, if he will not

> read what he signs, he alone is responsible for his omission."

In *Hill* v. *Syracuse R. Co.*, 73 N. Y., the Court at 353 held:

> "By accepting the contract without objection, the other party had a right to assume that he assented to its terms and the fact of not reading it cannot be interposed to prevent the legal effect of the transaction. Long v. N. Y. C. R. Co., 50 N. Y. 76; Belger v. Dinsmore, 37 N. Y. 166; Steers v Liverpool, etc. S. S. Co., 57 N. Y. 1; Magee v. C & R Tr. Co., 45 N. Y. 514."

In *Chicago R. Co. v. Belliwith*, 83 Fed. 437, the Court at 439 stated:

> "A written contract is the highest evidence of the terms of an agreement between the parties to it and it is the duty of every contracting party to learn and know its contents before he signs and delivers it. He owes this duty to the other party to the contract, because the latter may, and probably will, pay his money and shape his action in reliance upon the agreement. He owes it to the public, which, as a matter of public policy, treats the written contract as a conclusive answer to the question, what was the agreement?"

The petitioner herein relied on all of the terms of the contract, paid its money for equipment specifically requested by respondents who should be bound to all of the terms of the contract which should be held valid in all respects.

Process was effected exactly as required under Rule 4 (d)(1) of the Rules of Civil Procedure. Actual notice of the service was given to the respondents. The effect of the decision of the Court below is to nullify the language of the rule and to deprive the petitioner of due process under the Fifth Amendment of the Constitution. Inasmuch as Rule 4 (d)(1) of the Federal Rules of Civil Procedure does not require that the agent be under an obligation to send notice of services of process, the interpretation by the Court below that it does require such notice does violence both to the unequivocal provision of the contract between the parties as well as to the letter of the rule.

The results of the construction placed upon this significant paragraph by the Court below was, in effect, to make a new contract between the parties. The petitioner herein purchased the equipment leased to the respondents, predicated upon the contract and in reliance upon its ability to obtain jurisdiction over the respondents in Courts in its own local area. It would not have made the contract otherwise. By the construction placed upon the paragraph in question, the Court below has effectively deprived the petitioner of its rights under the contract without due process of law. Moreover, as pointed out in the dissenting opinion in the Court below:

> "To allow a defendant to insist upon what the majority here holds to be a defect in this privately drafted and voluntarily agreed to agency appointment, even though he has in no way been prejudiced thereby, is the essence of formalism. The purpose of service of process is to apprise the defendant that suit has been brought against him and to give him an opportunity to defend (citing cases). Once it is

found that that purpose has been served, the inquiry should come to an end." (R. 30)

In the landmark case of *Pennoyer* v. *Neff*, 95 U. S. 714, 735, the Supreme Court held:

> "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them."

The result of the determination by the Court below is, in the words of the opinion of Judge Moore, dissenting therefrom, to throw

> "in doubt the validity of countless provisions of a similar nature and throws the law into a state of confusion and uncertainty." (R. 32)

Since the contract provides "that the laws of the State of New York are applicable thereto", the decisions of the highest Court of the State of New York bear examination. They hold that a Court cannot make a new contract for the parties under the guise of interpreting the writing. *Central Union Trust Co.* v. *Trimble*, 255 N. Y. 88, 174 N.E. 72; *Western Union Telegraph Co.* v. *American Comm. Assoc.*, 299 N. Y. 177, 86 N.E. 2d 162. Only where the language of the contract is ambiguous and uncertain and susceptible of more than one construction may the Court interfere to reach a proper construction of that which is uncertain.

The respondents themselves submitted no affidavits in support of their application to quash service, nor does the record reveal any personal claim on their behalf that they were imposed upon.

A Court cannot make a new contract for the parties under the guise of interpreting the writing. *Friedman* v. *Handelman*, 300 N. Y. 188, 194, 90 N.E. 2d 31; *Brown* v. *Manufacturers Trust Co.*, 278 N. Y. 317, 16 N.E. 2d 350; *Graf* v. *Hope Building Corp.*, 254 N. Y. 1, 4, 171 N.E. 884; *Heller* v. *Pope*, 250 N. Y. 132, 164 N.E. 881; *Fleetash Realty Co.* v. *August Severio Construction Co.*, 21 Misc. 2d 350, 188 N. Y. S. 2d 714, 716, aff'd 11 A.D. 2d 769, 205 N. Y. S. 2d 212; *Frankel* v. *Tremont Norman Motors Corp.*, 21 Misc. 2d 20, 193 N. Y. S. 2d 722, 725, aff'd 10 A.D. 2d 680, 197 N. Y. S. 2d 576, aff'd 8 N. Y. 2d 901, 168 N.E. 2d 823. The Court must construe an agreement as made and may not make a new agreement by construction. *Sandberg* v. *Reilly*, 223 A.D. 57, 227 N. Y. S. 418. Parties may make their own bargains and they should be held to the terms of their agreement. *Cohen* v. *E. & J. Bass*, 246 N. Y. 270, 158 N.E. 618. A poor bargain may not be made good by judicial construction or recasting of the contract since it is a fair and reasonable assumption that a party has made what he believed to be the best bargain which he could obtain in his own interest. *Lexington Holding Corporation* v. *Holman*, 189 N. Y. S. 2d 269, 270. Where the intention of the parties, as in the case at bar, is clear and unambiguously set forth, effect must be given to the intent as indicated by the language used. *Delancey Kosher Restaurant and Caterer Corporation* v. *Gluckstern*, 305 N. Y. 250, 256, 112 N.E. 2d 276. The intention of the parties is found in the language used to express such intention. *Nau* v. *Vulcan Rail & Construction Co.*, 286 N. Y. 188, 198, 199, 36 N.E. 2d 106. The agreement of the parties is to be ascertained from the plain language used by them no matter what the intention. Presumptively, the intention

of the parties to a contract is expressed by the natural and ordinary meaning of their language referable to it and such meaning cannot be perverted or destroyed by the Courts through construction. *Gans* v. *Aetna Life Insurance Co.*, 214 N. Y. 326, 108 N.E. 443. The law presumes that the parties understood the import of their contract and that they had the intention which its terms manifested. *Cream of Wheat Co.* v. *Arthur H. Christ Co.*, 222 N. Y. 487, 493, 494, 119 N.E. 74.

If private contracts which are not in conflict with the public policy of the States or Nation are to be inhibited by judicial construction, the entire concept of free interstate commerce will be frustrated. The decision of the Court below is a deterrant to interstate commerce.

The court below indicated that the "plaintiff might have provided with the defendant's agreement that service or notice be waived * * *". "This would, however, have required defendant's consent which might or might not have been forthcoming." (R. 26)

It seems anomalous for the Court on one hand to have held that the defendants' consent to the designation of a specific individual upon whom service of process was to be made is unenforceable even though notice was actually given by such appointee, while holding that a similar consent to the waiver of either service or of notice would have been enforceable. Such holding is illogical and should, therefore, not be sustained.

2. There is no requirement in the contract nor in law for an agent designated for a specific purpose to be subject to the control of the person for whom he acts.

The use of the word "agent" in the contract is to be interpreted within the context of the instrument in which it is used. In the case at bar, the sole purpose of the use of the word "agent" was to accomplish the result of subjecting the respondents to the jurisdiction of the Courts within the State of New York. Compare, for example, Restatement of Law of Agency, 2d Section 1f, dealing with the statutory use of the word "agent". It is there stated:

> "Thus, the purpose of statutes providing substituted service of process on a public official is to satisfy the due process requirement of the United States Constitution. Although such a statute may label the public official as an 'agent' for receiving service of process, he is not an agent in the sense used herein. He is not, in fact, designated by the one whose account he 'accepts service', nor does he respond to that person's directions. * * * ".

It may, therefore, be said that an agency such as the one before the Court is not one in which the agent is necessarily designated by the one on whose account he accepts service, nor is he required to respond to such person's directions. Whereas, in the case of a statute, the Constitution requires notice be given by the public official designated by statute, the same inhibitions do not apply to individual citizens. This distinction was recognized by the majority in the Court below, where the court said, referring to such requirement:

"There is no such requirement when individuals freely contract for a method of substituted service." (R. 15)

Other illustrations may be given where a person acts for another although not under such other person's control. For example, a confession of judgment, a cognovit note or an escrow agreement.

Restatement of Law of Agency, 2d Section 15 provides: "An agency relation exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act."

The respondents manifested such intention by executing the agreement wherein such designation was made. The designee manifested her consent in conformity with Comment B of the aforementioned section, by accepting the service and by notifying the respondents that such service had been effected.

The agent so designated had the capacity to hold the power to act on behalf of the respondents and did so act and, therefore, came completely within the purvue of Section 21 of the aforementioned Restatement of the Law of Agency.

Under all of the circumstances, therefore, the agency created in the contract was valid, was acted upon and should be upheld.

CONCLUSION

The judgment appealed from should be reversed in all respects and the matter remitted to the District Court for further proceedings.

Respectfully submitted,

WILBUR G. SILVERMAN
Attorney for Petitioner
88-11 169th Street
Jamaica 32, N. Y.

IN THE

Supreme Court of the United States

October Term 1963

No. 81

NATIONAL EQUIPMENT RENTAL, LTD.,

Petitioner,

—against—

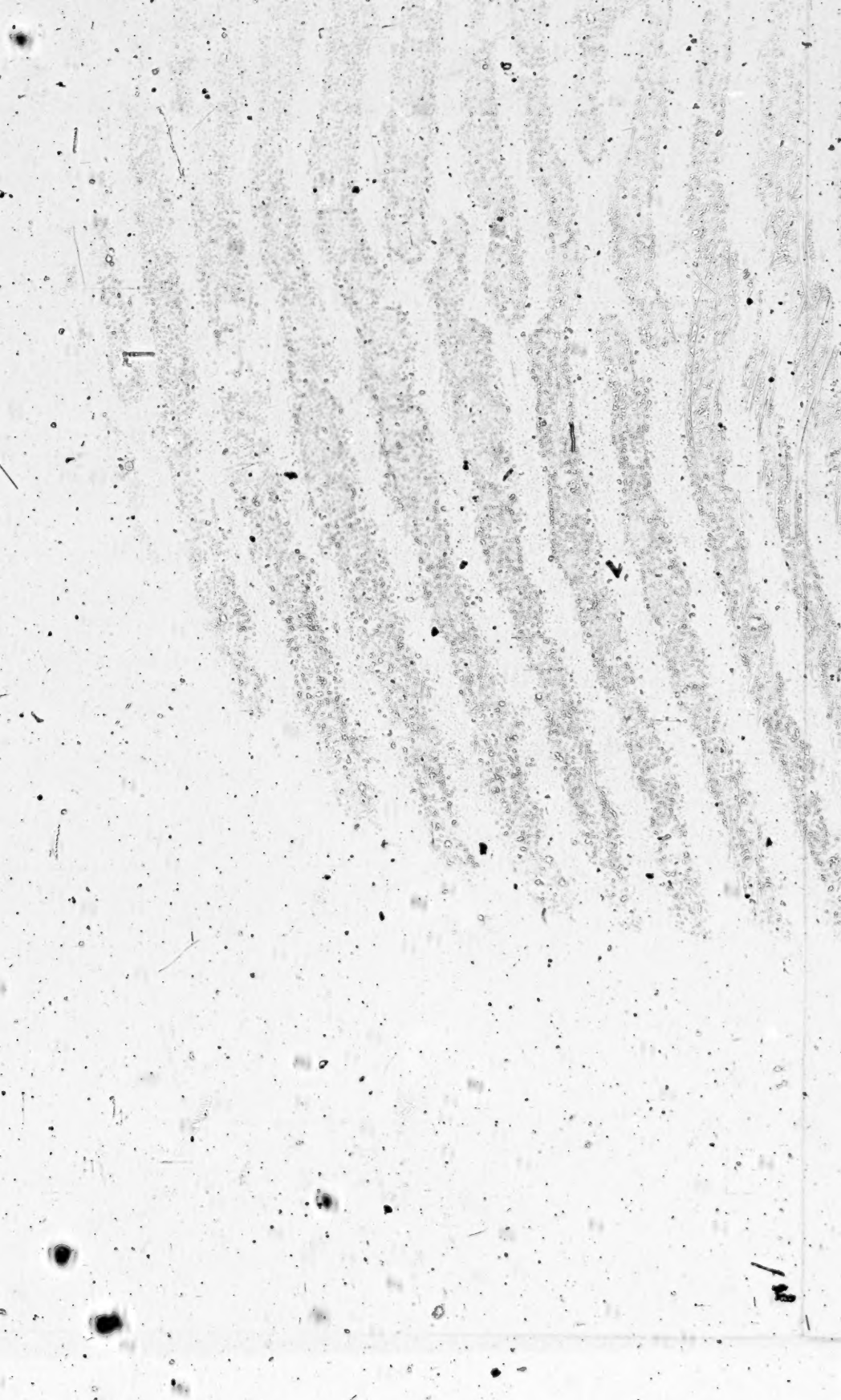
STEVE SZUKHENT and ROBERT SZUKHENT,

Respondents.

RESPONDENTS' BRIEF ON APPEAL

HARRY R. SCHWARTZ
Attorney for Respondents
325 Broadway
New York 7, N. Y.

32 CASE PRESS INC., 421 Hudson St., N. Y.—ORegon 5-4540



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Respondents.

RESPONDENTS' BRIEF ON APPEAL

Statutory Provision

1: Federal Rules of Civil Procedure, Rule 4 (d) (1):

"(d) Summons: Personal Service * * *. Service shall be made as follows:

(1) Upon an individual * * * by delivering a copy of the summons and of the complaint to an agent authorized by appointment * * * to receive service of process."

Question Presented

Is a person, who is unknown to respondents, and whose personal interest is diametrically opposed to respondents, and who is not obligated to act as agent, a valid agent of respondents to accept service of process; even though she be designated as such agent in a printed form contract. And must the contract, itself, require that respondents be notified of such service, in spite of the fact that respondents were notified in this instance.

Statement

Respondents are farmers residing in Flushing, Michigan. Petitioner sues for $23,713.00, of which, $3,093.00 it claims as attorney's fees for alleged breach of a written lease. It leased certain equipment to the respondents concerning which respondents had no knowledge and which it fraudulently represented to them would accomplish certain beneficial results for respondents.

The petitioner attempted service on the respondents pursuant to a printed provision in the lease which read as follows:

> "The lessee hereby designates Florence Weinberg, 47-31 Forty-First Street, Long Island City, N. Y. as agent for the purpose of accepting service of any process within the State of New York".

On January 24, 1962, a copy of the summons and complaint for each defendant was served on Florence Weinberg and thereafter mailed to respondents in Michigan.

Nowhere in the lease was there any provision requiring that a copy of the summons and complaint be forwarded to the respondents by such putative agent.

This alleged agent is the wife of one of the officers of the petitioner and is unknown to respondents. An application was made to quash such service. No attempt was made to go into the merits of the controversy because of insufficient time to ascertain the facts, and since the service had nothing to do with the merits. It is a great hardship for these two farmers, father and son, to travel to New York, stay at a hotel, and pay for their witnesses to come to New York. For petitioner it is a simple matter. Its representative

came to Michigan to sell the farmers the rental of the equipment. That is its business. Petitioner inserted such a provision because it knows the farmers cannot come here to protect themselves.

ARGUMENT

1. The service of the summons and complaint is void.

The provision, in the lease appointing Florence Weinberg, respondents' agent for the acceptance of service of process, does not contain any provision requiring that she mail such process to respondents. She could have kept it or thrown it away. She was under no obligation to mail it. The mere fact that it was mailed does not alter the situation. The question is not what she did but what she was required to do.

This question was decided by the United States Supreme Court in *Wuchter* v. *Pizzutti*, 276 U. S. 13, 48 S. Ct. 259. In this case Pizzutti recovered a judgment against Wuchter for personal injuries sustained by him due to the operation of Wuchter's auto in New Jersey. Wuchter resided in Pennsylvania and Pizzutti in New Jersey. Process was served on Wuchter by leaving it with the Secretary of State of New Jersey pursuant to the laws of New Jersey. Although this statute did not require service on the defendant Wuchter, nevertheless he was actually served personally in Pennsylvania but he did not appear, and final judgment was entered.

The Court held such service was void because the statute did not itself direct that process be forwarded to the defendant. It stated on page 19:

> ". . . but the enforced acceptance of the service of process on a state officer by the defendant would not be fair or due process unless such officer or the plaintiff is required to mail the notice to the defendant, or to advise him, by some written communication, so as to make it reasonably probable that he will receive actual notice".

And further on at page 24 it stated:

> "But it is said that the defendant here had actual notice by service out of New Jersey in Pennsylvania. He did not however, appear in the cause and such notice was not required by the statute. Not having been directed by the statute it cannot, therefore, supply constitutional validity to the statute or to service under it;" citing cases.

Petitioner fails to distinguish between the right to subject one's self to another jurisdiction and the right to be apprised that such jurisdiction has been properly invoked against him.

2. No valid agency had been created for acceptance of service on behalf of respondents.

The so called agent is not in reality an agent of respondents but of petitioner.

The petitioner at the time of the argument of the motion informed the Court that she is the wife of one of the officers of the petitioner. No disclosure was made as to any other interest she may have in the corporation although inquiry was made at that time by the Court. She even may be a stockholder and/or director. She is unknown to respondents. It is obvious that she is there to protect the interests

of petitioner not respondents, and thus is engaged in a capacity that is repugnant to the law.

An agent generally cannot represent both parties to a transaction or serve as an agent in a matter in which his personal interest is diametrically opposed to that of his principal. *Carr v. National Bank*, 167 N. Y. 375; *Girardi* v. *Irving*, 186 App. Div. 564, 174 N. Y. Supp. 701.

Rule 4 (d) (1) of the Federal Rules of Civil Procedure contemplates a real agent of a person not a fictitious one.

Agents cannot take upon themselves incompatible duties and characters or become agents in a transaction where they have an adverse interest or employment.

Respondents were not informed of the putative agent's close relationship to petitioner. The so called agent was acting under the supervision and control of petitioner not respondents.

Also as the lease was a fixed printed form prepared by the petitioner and tendered to the respondents, it must be construed most strongly against the petitioner. See *Aschenbrenner* v. *U. S. Fidelity & Guarantee Co.*, 292 U. S. 80, 54 S. Ct. 590; *Grayee* v. *American Insurance Company*, 109 U. S. 278.

See Kessler; Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 Col. L. 12. 629 and Llewellyn, Book Review, 52 Harv. L.R. 700.

As Kessler stated on p. 632, standard contracts are typically used by enterprises with strong bargaining power. The weaker party in need of the goods or services, is frequently not in a position to shop around for better terms,

either because the author of the special contract has a monopoly (natural or artificial), or because all competitors use the same clauses. His contractual intention is a subjection more or less voluntary to terms dictated by the strong party, terms whose consequences are often understood only in a vague way, if at all.

Referring to insurance as an illustration, he states p. 633, "Handicapped by the axiom that Courts can only interpret but cannot make contracts for the parties, Courts had to rely heavily on their prerogative of interpretation to protect policy holders. Courts have shown a remarkable skill in reaching 'just' decisions by construing ambiguous clauses against their author even in cases where there was no ambiguity."

Standard contracts in particular could thus become effective instruments in the hands of powerful industrial and commercial overlords, enabling them to impose a new feudal order of their own making upon a vast horde of vassals.

CONCLUSION

The order appealed from should be affirmed.

Respectfully submitted,

HARRY R. SCHWARTZ
Attorney for Respondents

IN THE

Supreme Court of the United States

October Term, 1963

No. 81

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Petitioner,

—against—

STEVE SZUKHENT AND ROBERT SZUKHENT,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION OF THE BANKS NAMED BELOW FOR LEAVE TO FILE THE ACCOMPANYING BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONER

DAVID HARTFIELD, JR.
Counsel for: Bankers Trust Co.
14 Wall Street
New York 5, New York

ALLEN F. MAULSBY
Counsel for: Chemical Bank New York Trust Co.
1 Chase Manhattan Plaza
New York 5, New York

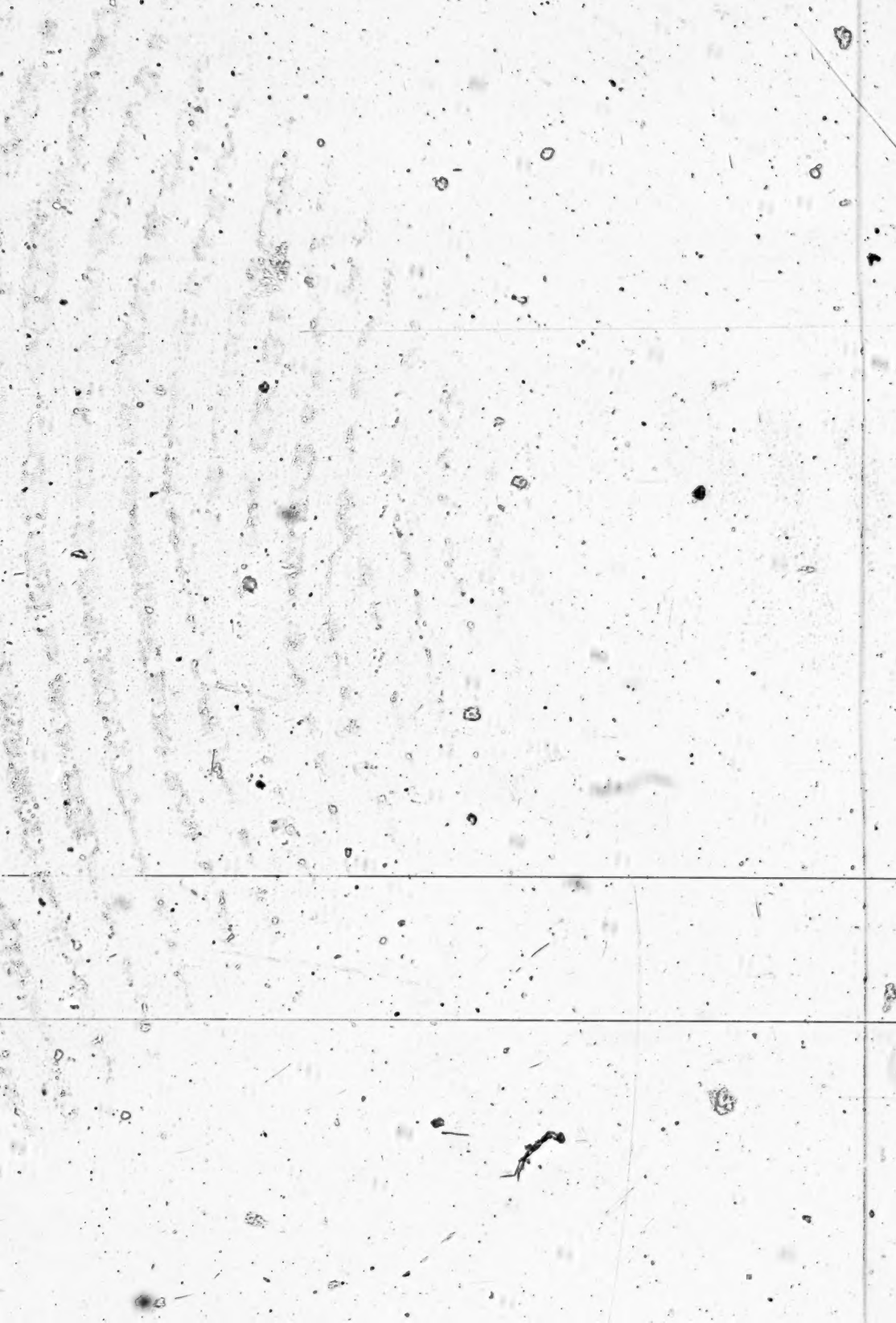
BENJAMIN C. MILNER, III
Counsel for: Manufacturers Hanover Trust Co.
120 Broadway
New York 5, New York

ROY C. HABERKERN, JR.
Counsel for: The Chase Manhattan Bank
1 Chase Manhattan Plaza
New York 5, New York

MERRELL E. CLARK, JR.
Counsel for: Irving Trust Co.
40 Wall Street
New York 5, New York

HENRY L. KING
Counsel for: Morgan Guaranty Trust Company of New York
The Bank of New York
1 Chase Manhattan Plaza
New York 5, New York

Of Counsel:
WHITE & CASE
MILBANK, TWEED, HADLEY & McCLOY
CRAVATH, SWAINE & MOORE
WINTHROP STIMSON PUTNAM & ROBERTS
SIMPSON THACHER & BARTLETT
DAVIS POLK WARDWELL SUNDERLAND & KIENDL



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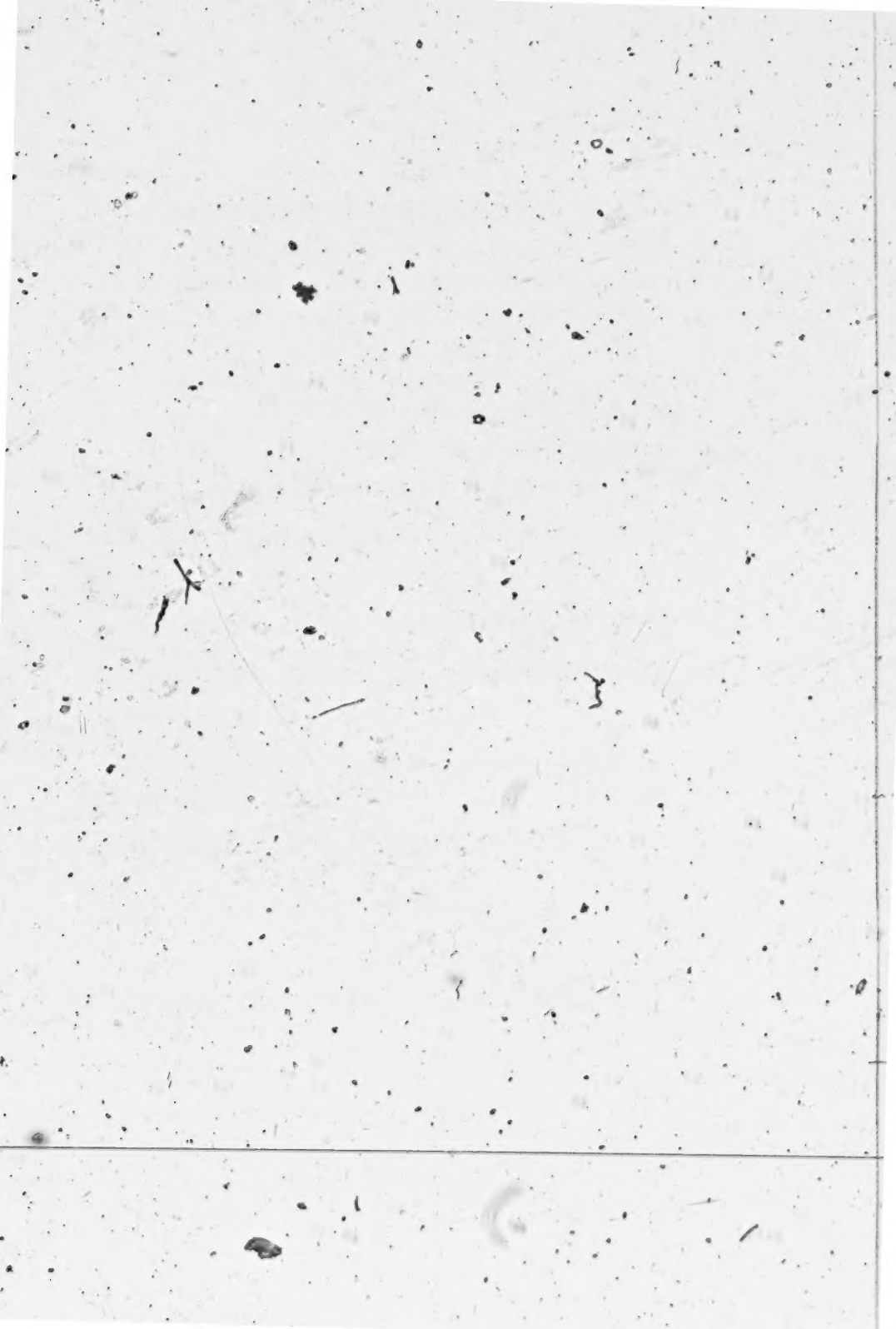

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FOR THE SECOND CIRCUIT

MOTION OF THE BANKS NAMED BELOW FOR LEAVE TO FILE THE ACCOMPANYING BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONER

MOTION

The undersigned banks in the City of New York hereby respectfully move for leave to file the accompanying brief *amici curiae* in support of petitioner. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the defendant-respondent was requested but refused.

The case comes to this Court by writ of certiorari granted April 22, 1963. On the petition for such writ, the undersigned banks moved for leave to file a brief *amici curiae* in support of the petition. That motion was granted by this Court on April 22, 1963.

The instant motion is for leave to file a brief *amici curiae* on the merits of the case.

The Decision Below

In the instant case, the Court of Appeals for the Second Circuit, in a two-to-one decision, held that a designation by a non-resident of a local agent to receive service of process in New York was invalid for lack of an express agreement by the agent to act as such and to notify the principal of the receipt of any process.

Interest of the Undersigned Banks

The interest of the undersigned banks in this case arises from the fact that they are engaging and have engaged in numerous financing, banking and fiduciary transactions, national and international. These transactions take a great variety of forms, of which a few examples are promissory notes, revolving credit agreements, loan agreements, guarantees, debenture indentures, escrow agreements, fiscal agency appointments and the like. Also, the banks make loans on the security of the assignment of rentals payable under chattel leases of the kind here involved.

In a considerable number of these instruments, particularly those involving borrowers and other customers in foreign countries, there is a clause, similar to the clause under consideration in this case, whereby the customer designates an agent for the service of process in New York. Without a provision for the appointment of a local agent for the service of process, interstate and international financial transactions would be severely hampered. A local lender must have some assurance that he can enforce

the terms of his agreement without having to resort to the courts of a foreign state or country in a suit on the merits.[1]

The bulk of the transactions referred to above are long-term. Because of this it is necessary to make the appointment of a local agent a permanent appointment, not subject to lapsing by virtue of the death of any one individual. For this reason these agents are usually designated in terms of an official capacity, rather than by name. Thus there are designations in terms of "the Consul General of Canada in New York", "the Secretary of X Bank", and "any partner in the law firm of X Y and Z". If the opinion of the Court of Appeals requires, as it appears to, that the agent indicate his consent at the time of the appointment, that requirement is impossible to satisfy when the agent is designated by office rather than by name, since the consent would be valid only so long as the occupant of the office remained the same. If the opinion means that the consent may be given subsequently by each successive incumbent of the office, the requirement is not only unduly burdensome but presents the very real danger that the incumbent will be unaware of or will overlook the need to express his consent to the principal. Even in those cases where the agent is designated by name, express consent by the agent to act as such is probably the exception rather than the rule.

---

[1] As Judge Moore pointed out in his dissent below "To carry a New York obtained judgment to the other forty-nine states for enforcement is quite a different matter than trying lawsuits and engaging counsel for this purpose in these other States." R. 27,

Questions of Law and Fact that May Not Adequately Be Presented by the Parties

The undersigned believe that there are at least three relevant issues of fact and law which they can submit to this Court over and above the material that has been, and apparently will be, submitted by the Petitioner.

First, as indicated above, the undersigned have daily and firsthand knowledge of the great practical utility in commercial and financial transactions of the designation of a local agent to receive service of process, the wide variety of the situations in which this practice is used and the unwarranted damage that the instant decision would do to this practice.

Second, the undersigned have noted that the rules of the law of agency, particularly the *Restatement 2d*, as applied to the designation of an agent to receive service of process, were not discussed in the briefs of the parties in the Court of Appeals or in the Petition for Certiorari, although the *Restatement* was the principal authority relied on by the majority in the decision below. Since we believe that the court below applied incorrect agency principles, we request the opportunity to brief this Court on the subject.

Third, there are numerous instances in which nonresident persons are required, by statute and by administrative rule, to designate a local agent to receive service of process or to receive service of formal papers akin to process. Thus the Interstate Commerce Act requires common carriers to designate an agent in Washington, D.C. for service of process and other papers. 49 U.S.C. § 50. There is no requirement in the statute that the designated agent expressly consent to act as agent. Similarly the

Securities and Exchange Commission requires the inclusion in each Registration Statement of the name and address of an agent for service (Form S-1); it requires in each application for registration as a broker or dealer, and in each application for registration as an investment adviser, a consent by the applicant that notice of any proceeding before the Commission may be served on a person designated by the applicant (Forms BD and ADV). None of these forms provides for any expression of consent by the person so designated.

Dated: New York, New York
August 23, 1963

Respectfully submitted,

.....

HENRY L. KING
Counsel for: Morgan Guaranty Trust Company of New York
The Bank of New York
1 Chase Manhattan Plaza
New York 5, New York

BRIEF IN SUPPORT OF PETITIONER

Summary of Argument

The court below erred in holding invalid a provision in a lease appointing a third person, not a party to the lease, agent of the lessee to receive process in any action arising out of the lease. In so holding the court placed an unwarranted interpretation on Rule 4(d) of the Federal Rules of Civil Procedure, and decided a question of law which is of major importance to the financial and business communities in a manner inconsistent with well-established patterns of business and in conflict with principles of law established by other courts. The court reached this erroneous conclusion because it misinterpreted basic principles of the law of agency and completely ignored the principle that an agency is created when the agent acts on the principal's behalf, as well as when the agent agrees to act on the principal's behalf.

In the course of its opinion below, the court announced a rule requiring that a contract appointing an agent for process make intrinsic provision insuring that the principal will receive notice of any service of process upon the agent. This is error because there is no such requirement when individuals freely contract for a method of substituted service. It is well settled that private parties can agree that service or notice be waived in any action arising out of the contract. There is no question of due process in the case under consideration since notice was in fact given to respondent.

The concern of the court below with contracts of adhesion was completely unwarranted. Modern commerce could not be carried on without a great variety of forms and the presence of a form does not necessarily imply the presence of a contract of adhesion. There is no indication from the Record that the parties were of unequal bargaining power. Furthermore, the court should not be required to look behind every contract in order to determine whether it was freely entered into or whether it was a contract of adhesion.

ARGUMENT

POINT I

In order for there to be an effective agency a person appointed an agent need not, at the time of his appointment, expressly undertake to act for his principal.

Paragraphs (1) and (3) of Federal Rule of Civil Procedure 4(d) provide that service of process upon an individual, corporation, partnership or unincorporated association may be made on "an agent authorized by appointment or by law to receive service of process". There is no indication that any principles other than generally accepted agency principles are to govern the determination of who is "an agent authorized by appointment." In the case at bar, by the terms of the lease, Weinberg was appointed agent of the lessees. She acted as such by receiving process and promptly forwarding a copy to her nonresident principals. Nevertheless, the court below held the appointment ineffective because "defendants never dealt with her and had no indication of any undertaking

on her part to act as their agent until receipt of process many months later." R. 25.

As authority for the novel position that an agent must, at the time of his appointment, expressly undertake to act as agent, the court relied upon Sections 1 and 15 of the *Restatement of Agency*[2]. R. 25. These Sections stand for the proposition that an agency exists only if there has been a manifestation by the principal that the agent may act on his account and subject to his control, and consent by the agent so to act. However, this does not support the proposition, implicit in the holding below, that express consent of the agent must be given at the time of his appointment.

On the contrary, the *Restatement* specifically negatives any such conclusion by recognizing that the required consent may be given either by an agreement to act or by performing the required act.

> "* * * The principal must in some manner indicate that the agent is to act for him, and the agent *must act or agree to act* on the principal's behalf and subject to his control. * * *" (*emphasis added*) *Restatement Agency* 2d § 1 Comment a (1958).

Comment (b) to Section 15 is even more closely in point. After stating the principle that the agency relation exists only if the agent consents to it, the comment continues:

> "* * * As in the case of contractual relations, the manifestation of the principal may be such that it is not necessary for the acceptance to be communicated to him. Thus, if the principal requests another to act for him with respect to a matter,

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[2] In this Brief, all citations to the *Restatement* are to the Second edition (1958).

> and indicates that the other is to act without further communication and the other consents so to act, the relation of principal and agent exists. If, under such circumstances, the other does the requested act, it is inferred that he acts as agent unless he manifests that he does not so intend or unless the circumstances so indicate. This inference is strengthened if, being requested to act in the matter, the other does something which he could properly do only as an authorized agent." *Restatement Agency* 2d § 15 Comment b (1958).

The three illustrations given for this last comment are all cases where the agent acts without otherwise communicating his consent to the principal. For example, Illustration 1 states: "P writes to A, whose business is purchasing for others, telling him to select described goods and ship them at once to P. Before answering P's letter, A does as directed, charging the goods to P. A is authorized to do this." *Restatement Agency* 2d § 15 Comment b Illustration 1 (1958).

The case at bar falls precisely within this principle. The appointment of Weinberg by respondents was in such terms as to indicate that she was to act without future communications from respondents. She was to accept service of process on their behalf. This she did, and when she did so, she acted as agent.

> "The principal's authorization may neither expressly nor impliedly request any expression of assent by the agent as a condition of the authority, and in such case any exercise of power by the agent within the scope of the authorization, during the term for which it was given, or within a reasonable time if no fixed term was mentioned, will bind the

principal." 2 *Williston on Contracts* § 186 (3rd ed. 1959).

The insistence by the court below upon consent by the agent to act, and its refusal to recognize the doing of the requested act as effective, is thus seen to be completely contrary to long established legal principles. The court's preoccupation with express consent and with the fact that lessees and Weinberg did not deal with one another would seem to indicate that the court requires a contract between the parties before there can be a genuine agency. It is manifest that insistence upon a contract is error:

> "It is not essential to the existence of authority that there be a contract between the principal or agent or that the agent promise or otherwise undertake to act as agent." *Restatement Agency* 2d § 26 Comment a (1958).

As indicated above, to require an agent to give a specific undertaking to act would upset well-settled procedures in important transactions in the business and financial communities. We of course believe the decision below to be error as a matter of law. Even if the majority below intended the principles enunciated to be confined to the facts of this case, it is possible that some persons will read the decision below as casting doubt upon the validity of many executed transactions wherein the procedure under discussion was used. Furthermore, the decision below might be read to apply to all agency arrangements and not only to appointments of agents for service of process. This would cause complete confusion and chaos because as we have indicated, the result has no basis in law. There was never any requirement that an agent, at the time of his appoint-

ment, must expressly consent to act as agent. This is evident, for example, by reference to the New York statutory short form of general power of attorney, General Business Law Art 13 §§ 220-235.[3] A power of attorney is one type of agency and yet the statutory form of power provides no place in the instrument for the agent to indicate his consent to act as agent. Similarly, the forms of power of attorney contained in leading form books, *e.g.* 7A Nichols, *Cyclopedia of Legal Forms Annotated* §§ 7.1565-7.1572 (1959), have no provision for the agent to expressly undertake to act as agent. Indeed, the New York statutory short form of general power of attorney includes, as one area of authority granted to the agent, "claims and litigation". Section 229(6) of the General Business Law expressly provides that, if this authority is granted, the principal authorizes the agent "to accept service of process, to appear for the principal, to designate persons upon whom process directed to the principal may be served, * * * " And yet the prescribed text of the power of attorney (General Business Law § 220) is entirely silent as to any requirement that the agent express his agreement to serve.

In addition, the decision below casts doubt upon the validity of procedures required by federal statutes and federal regulatory agencies. Thus the Interstate Commerce Act requires common carriers to designate an agent in Washington, D. C. for service of process and other papers. 49 U.S.C. §50. The designation must be in writing and is to be filed with the Secretary of the Commission. There is

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[3] Article 13 of the General Business Law will be replaced by Title 15, Article 5, of the General Obligations Law, effective September 27, 1964. The General Obligations Law makes no change of substance in present Article 13 of the General Business Law.

no requirement in the statute that the designated agent expressly consent to act as agent. Similarly, in numerous instances the Securities and Exchange Commission requires that non-resident persons designate a local agent to receive service of process or to receive service of formal papers akin to process. Thus § 8(f) of the Securities Act of 1933, 15 U.S.C. § 77h(f), provides that any notice of hearing on a stop order under § 8 of the Act can be served on a foreign person by serving "its duly authorized representative in the United States named in the registration statement." And Form S-1, the ordinary form of registration statement for issues or distributions required to be registered under that Act, contains on the facing sheet a requirement for the "(Name and address of agent for service)"; see also Forms S-2, S-5, S-8, S-9 and S-14. In none of these Forms is there any provision for the person so designated to undertake expressly to act as agent, nor is this in fact done.

In addition to requiring an express undertaking by the agent to act as agent, the court below was apparently concerned by the fact that defendants never met Weinberg (the agent). This is evident from the court's statement that, "Defendants never dealt with her * * * ". R. 25. Insistence upon direct dealing between principal and agent is clearly error. As the *Restatement of Agency* states:

> "The manifestations to the agent can be made by the principal directly, or by any means intended to cause the agent to believe that he is authorized or which the principal should realize will cause such belief." *Restatement Agency* 2d § 26 Comment b.

There are numerous agency relationships created without principal and agent ever meeting, or even dealing di-

rectly with one another. One such example is an ordinary stock power for the transfer of shares of stock. 3 Nichols, *Cyclopedia of Legal Forms* § 3.974 (1958). A stock power in addition to transferring the stock to another, also contains a power of attorney to transfer the stock on the books of the corporation. The transferor of the stock invariably leaves the attorney's name blank, since he does not know who will make the transfer on the books. The attorney is a clerk of the transfer agent and fills in his own name when he makes the transfer on the books. I Christy, *The Transfer of Stock* § 63 (3d ed. 1962). The transferor (the principal) and the attorney (the agent) never meet or deal directly with one another and yet there is a valid agency relationship between them. Thus it is clear that there is no requirement that the principal and agent ever deal directly with one another.

POINT II

The court below erred in requiring a provision in the lease whereby the agent undertook to give notice to the principal.

The court below, in addition to requiring that the agent, at the time of his appointment, consent to act as agent, interpreted Rule 4(d) as requiring that the agent also undertake to give notice to his principal of any future service of process. The absence of such an undertaking in the case at bar contributed to invalidating the lease provision for the appointment of the agent. The court reached this result although in fact the agent gave written notice.

In reaching this result the court relied upon *Wuchter* v. *Pizzutti*, 276 U. S. 13 (1928), which decided that a state

non-resident motorist statute was unconstitutional because it did not require the statutory agent to give notice to the defendant. In the case at bar the court below recognized that "There is no such requirement when individuals freely contract for a method of substituted service." R. 25. However, in the guise of "determining the meaning and effect of the provisions of the contract", R. 25, the same court read the constitutional requirements of *Wuchter* into private contracts providing for a method of substituted service. This holding is manifest error. In the first place there is no such requirement in private contracts entered into by individuals. Secondly, this issue was not properly before the court.

It is settled that private parties to a contract can agree that service or notice be waived in any action arising out out of the contract. *Bowles* v. *J. J. Schmitt & Co.*, 170 F. 2d 617, 622 (2d Cir. 1948), *Gilbert* v. *Burnstine*, 255 N. Y. 348, 174 N. E. 706 (1931). Since notice can be waived by the parties, it is clear that there is no rule that a provision for notice must be inserted in a contract. This is the result that has been reached by other courts faced with this issue. Thus, in *Kenny Construction Company* v. *Allen*, 248 F. 2d 656 (D.C. Cir. 1957), a construction contract entered into between engineering consultants and the District of Columbia stated that the engineering firm appointed the clerk of the court its agent to receive service of process in any action arising out of the contract or the work required to be performed under it. There was no provision for notice to be given to the engineering consultants in the event service was so made. The court held, in an action between a contractor and the engineering consultants, that service could be had on the latter by

serving the clerk of the court. Thus, a contract provision similar to the one under discussion, with no requirement for the giving of notice to the principal, was held to be valid—even in favor of a person who was not a party to the contract.

In *Green Mountain College* v. *Levine*, 120 Vt. 332, 139 A. 2d 22 (1958), a promissory note between private individuals appointed the Secretary of State agent of the debtor to accept service of process. The debtor defaulted and suit was brought by serving the Secretary of State. There was no provision in the contract whereby the agent undertook to give notice to the principal. The court held that service was proper, quoting with approval from *Gilbert* v. *Burnstine*, 255 N. Y. 348, 174 N. E. 706 (1931):

> " 'Contracts made by mature men who are not wards of the court should, in the absence of potent objection, be enforced. Pretexts to evade them should not be sought. Few arguments can exist based on reason or justice or common morality which can be invoked for the interference with the compulsory performance of agreements which have been freely made. Courts should endeavor to keep the law at a grade at least as high as the standards of ordinary ethics. Unless individuals run foul of constitutions, statutes, decisions or the rules of public morality, why should they not be allowed to contract as they please? Our government is not so paternalistic as to prevent them. Unless their stipulations have a tendency to entangle national or a state affair, their contracts in advance to submit to the process of foreign tribunals partake of their strictly private business. Our courts are not interested except to the extent of preserving the right to prevent repudiation. In many instances

problems not dissimilar from the one presented by this case have been solved. Vigor has been infused into process otherwise impotent. Consent is the factor which imparts power. Textwriters have discussed the subject and have concluded from the authorities that nonresident parties may in advance agree to submit to foreign jurisdiction. Beale, the Jurisdiction of Courts over Foreigners, 26 Harvard Law Review, 193; Freeman on Judgments (5th Ed.) p. 3053; Goodrich, Conflict of Law, p. 141; Scott, Fundamentals of Procedure, pp. 39-41.'" 139 A. 2d at pp. 824-25.

From the above it is clear that Rules 4 (d) (1) and (3) do not require the designated agent to undertake to give notice to his principal of any future service of process and that any holding to that effect by the court below should be reversed.

While holding that there must be an undertaking by the agent to give notice of service of process to the principal and that the lack of such provision invalidated the service in this case, the court below, relying upon *Wuchter* v. *Pizzutti*, 276 U. S. 13 (1928), held irrelevant the fact that in this case notice was actually given. It is submitted that once it was determined that notice was in fact given this should have ended the court's inquiry into the matter.

In *Wuchter, supra,* notice was in fact given, but this did not halt this Court from making further inquiry. The reason actual notice was considered irrelevant in *Wuchter* was because of the demands of the Fourteenth Amendment. As this Court stated (276 U. S. at 24): "Not

having been directed by the statute it cannot, therefore, supply constitutional validity to the statute or to service under it, * * *." But in the case at bar, there is no issue of state power under the Fourteenth Amendment. There is no agency forced upon the principal by virtue of a state statute and thus giving rise to a question of due process. Rather, there is merely the issue of the effectiveness of service pursuant to a private contract. In fact, notice was given. Hence, *in this case*, there was no denial of due process. As Professor Moore states:

> "The phrase 'agent authorized by appointment to receive service of process' is intended to cover the situation where an individual actually appoints an agent for that purpose. No question of due process arises with respect to service upon an agent in such a situation." 2 *Moore's Federal Practice* ¶4.12, p. 931 (2d ed. 1962).

Consequently, no issue of due process was before the court, and the court exceeded its authority when it decided that the lease itself must provide for notice. As Judge Moore, in his dissent in the court below, stated (R. 30):

> "To allow a defendant to insist upon what the majority here holds to be a defect in this privately drafted and voluntarily agreed to agency appointment, even though he has in no way been prejudiced thereby, is the essence of formalism. The purpose of service of process is to apprise the defendant that suit has been brought against him and to give him an opportunity to defend. International Shoe Co. v. Washington, 326 U. S. 310 (1945); Wuchter v. Pizzutti, supra, Grooms v. Greyhound Corp., 287 F. 2d 95 (6th Cir. 1961); Tarbox v. Walters,

192 F. Supp. 816 (ED Pa. 1961); American Football League v. National Football League, 27 F.R.D. 264 (D Md. 1961). Once it is found that that purpose has been served, the inquiry should come to an end."

POINT III

The emphasis by the court below upon contracts of adhesion is unwarranted by the record and is improper as a practical matter.

The court below was obviously concerned that the provision in question could be used as a vehicle of oppression to permit the entry of a default judgment without notice to the defendant. This is the thrust of the court's remark that the contract in question is "a contract of adhesion", R. 25.

The phrase, "contract of adhesion", seems to have first been used in Patterson, *The Delivery of a Life Insurance Policy*, 33 Harv. L. Rev. 198, 222 (1919). A leading article by Professor Kessler discusses these contracts in great detail. Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629 (1943). Professor Kessler uses the phrase to describe form contracts which are thrust by one party on the other, with no choice in the latter but to adhere. Professor Kessler recognized that "In so far as the reduction of loss of production and distribution thus achieved is reflected in reduced prices, society as a whole ultimately benefits from the use of standard contracts." *Id.* at 632. However, he argued that standardized contracts are in *some cases* contracts of adhesion due to the fact that they are used by enterprises with strong bargaining power, where the

weaker party is in no position to shop around for better terms because the user of the standard contract is a monopoly or because all competitors use the same clauses.

It may well be that in some cases standardized contracts are "contracts of adhesion", in the invidious sense of that phrase. But it is fantasy to assume, as the court below did, that every contract on a printed form is a "contract of adhesion". It is obvious that modern society cannot function without a wide use of forms. The mere use of a form does not necessarily suggest superior bargaining power and consequently a "contract of adhesion". Thus, the contracts in which we, the *amici curiae,* use the appointment of agent clause would not be considered adhesion contracts. The transactions involve banks on one side, and many of the largest United States and foreign corporations on the other side, a situation in which there is certainly no unequal bargaining power and consequently no element of adhesion. Yet the decision of the court below seems to assume that every contract, on a standard form, in which there is an appointment of a local agent for the service of process, is an adhesion contract.

Looking to the facts of this case, there is no evidence in the Record that National Equipment Rental, Ltd. had bargaining power superior to that of the defendants. For all we know National is a small company and the Szukhents have a large farm upon which are used many machines similar to the ones leased in the instant case. It is also perfectly obvious that National is not the only equipment leasing company in the United States. The Szukhents were certainly able to shop around for terms which they believed to be favorable. Thus, there is no evidence in the Record that this is a "contract of adhesion".

Even if this is considered to be a "contract of adhesion", there is still no warrant for completely disregarding a clear and unambiguous contractual provision. Provisions which are contained in contracts of adhesion are merely interpreted least favorably to the person who supplies the words. This salutary rule is one of interpretation only, and is not to be applied unless after the application of all other rules of interpretation, there remain two possible and reasonable interpretations:

> "After applying all of the ordinary processes of interpretation, including all existing usages, general, local, technical, trade, and the custom and agreement of the two parties with each other, having admitted in evidence and duly weighed all the relevant circumstances and communications between the parties, there may still be doubt as to the meaning that should be given and made effective by the court. This doubt may be so great that the court should hold that no contract exists. If, however, it is clear that the parties tried to make a valid contract, and the remaining doubt as to the proper interpretation is merely as to which of two possible and reasonable meanings should be adopted, the court will adopt that one which is the less favorable in its legal effect to the party who chose the words." 3 *Corbin on Contracts* § 559 (1960).

The rule has no application if the contract term has only one reasonable interpretation.

In the case at bar, the provision for the appointment of the agent was clear and unambiguous. It is not subject to two or more reasonable interpretations and there is consequently no reason to apply rules of interpretation. Therefore, the contract should be enforced as written even if it were to be considered to be a "contract of adhesion".

The court below however went far beyond the application of this rule of interpretation. The court did not interpret the provision in a manner less favorable to the party who chose the words. Rather it disregarded the provision entirely. There is no authority for doing this merely because a contract of adhesion is involved.

What the court in fact did was to refuse to give effect to a provision because the court apparently believed it to be unconscionable. While such action has authoritative precedent in some cases, e.g. *Hume* v. *U. S.*, 132 U. S. 406 (1889), the provision which is sought to be avoided must be truly unconscionable so that to enforce it would be "inconsistent with sound policy and good morals." *Trist* v. *Child*, 21 Wall (U. S.) 441 (1874). Examples of such provisions are agreements for the control of public officials, *Linn* v. *Ula Uranium Company*, 163 F. Supp. 245 (D. Utah), *aff'd*, 265 F. 2d 916 (10th Cir. 1959); an agreement between a lawyer about to be elected to a judgeship and another lawyer to divide a fee to be received in connection with handling a case by the latter in the court in which the first mentioned lawyer was to sit as judge, *Schnackenberg* v. *Towle*, 4 Ill. 2d 561, 123 N. E. 2d 817, *cert. denied*, 349 U. S. 939 (1955). The cases are collected in 4 *Williston on Contracts* § 615 A (3d ed. 1961).

The appointment of an agent for service is manifestly not in the class of provisions which are considered to be oppressive or unconscionable. This is a procedure, sanctioned by the Federal Rules of Civil Procedure, which is found in innumerable contracts. The fact that this provision is agreed to every day by hundreds of contracting parties—large and small—is evidence of its wide acceptability

and unoppressive nature. Consequently there was no valid basis on which the court could disregard this provision.

In addition, we question whether this is the type of inquiry the courts can and should undertake in every case. The factors suggested above would have to be examined in each case in order to determine whether there was actual consent or whether a contract of adhesion was involved. As the Virginia Law Review states in discussing this case:

> "However, the application of this result is not without pitfalls. The issue of actual consent is injected into every suit on such a note or form contract. Hence, though the court reached a desirable result, the application of the principle evolved in the case may prove somewhat difficult." 49 Va. L. Rev. 1030, 1035 (1963).

Judge Moore, dissenting below, perhaps best sums things up when he states:

> "Hard cases may make bad law but easy cases, misconceived to be hard ones, make even worse law because in the latter there is not even the seeming justification attendant the former.
>
> Defendants here received all they were entitled to. They agreed to submit to the jurisdiction of the courts in New York and that is all plaintiff required them to do. No default judgment is contemplated; they received adequate notice of the suit pending against them and were afforded ample opportunity to defend. In order to relieve them of this obligation which they voluntarily incurred, the majority throws in doubt the validity of countless provisions of a similar nature and throws the law into a state of confusion and uncertainty. If, as the majority seem to fear, this agency provision can be used as

a vehicle of oppression and overreaching, I suggest that we wait until such a case is presented to us. The same Federal Rules that provide for service of process upon an agent authorized to receive such service also contain provision for the setting aside of default judgments, Rule 55(c), and for relieving a party from a final judgment, Rule 60(b). I cannot bring myself to believe that the federal courts would not, in such a case, use the above rules to good advantage.

I would require the parties to abide by their contract and would reverse the district court." R. 31-32.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Dated: New York, New York
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Respectfully submitted,

DAVID HARTFIELD, JR.
Counsel for: Bankers Trust Co.
14 Wall Street
New York 5, New York

ROY C. HABERKERN, JR.
Counsel for: The Chase Manhattan Bank
1 Chase Manhattan Plaza
New York 5, New York